137-692

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1541.

WILLIAM CALDWELL, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF TEXAS.

FILED NOVEMBER 3, 1890.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 19, 1890.

a WM. CALDWELL, Pl't'ff in Error,
vs.
THE STATE OF TEXAS, Def't in Error.

Appealed from the court of appeals of Texas.

Transcript demanded on the first day of September, A. D. 1890, by Messrs. Burns & Burns, att'ys for pl't'ff in error, and delivered to said Burns & Burns on the thirteenth day of September, A. D. 1890.

H. A. MORSE,
Clerk Court of Appeals of Texas, at Galveston.

b Be it remembered that a term of the court of appeals of Texas, at Galveston, was begun and holden at Galveston, in said State, on Monday, the sixth day of January, A. D. 1890, the same being the first Monday in said month and the day designated for that purpose, when there were present the Hon. Jno. P. White, presiding judge, and Judge Sam. A. Willson; W. L. Davidson, ass't att'y gen'l; H. A. Morse, clerk.

At said term the following cause on appeal came on for trial, to wit:

WM. CALDWELL, Appellant,
vs.
THE STATE OF TEXAS, Appellee. } No. 2849.

Appeal from Harris county.

Said term of court adjourned March 23rd, 1890.

1 *Caption.*

At a regular term of the honorable criminal district court of Harris county, held in and for said Harris county, before the Honorable C. L. Cleveland, judge thereof, presiding, which began on the 7th of October, 1889, and adjourned on the 1st of November, 1889, the following cause came on for trial, viz:

THE STATE OF TEXAS
vs.
WILLIAM CALDWELL. } No. 6001.

Order of Change of Venue.

Be it remembered that at a regular term of the district court for the county of Fort Bend, State of Texas, begun and holden in the town of Richmond on the 24th day of September, 1888, Hon. Wm. H. Burkhart, judge thereof, presiding, the following proceedings were had in relation to the case of William Caldwell, charged with the murder of one J. M. Shamblin, to wit:

And now, on this the 27th day of September, 1888, the grand

jury came into open court, a quorum of their number being present, and through their foreman presented to the court the following bill of indictment, to wit:

THE STATE OF TEXAS
vs.
WILLIAM CALDWELL. } Offence, Murder.

THE STATE OF TEXAS
vs.
WILLIAM CALDWELL. } No. 3054.

Order for Special Venire.

Sept. 28th, 1888.—Special venire for 60 persons to try this case, returnable 2nd October, and jurors to attend 4th October, at
2 9 a. m., the day set for his trial or disposition hereof.

Order Postponing Case.

October 5th.—This case is postponed until Monday, because after the State announced ready the defendant objected going to trial because not served with a list of venire as required by law. The defendant excepted to the action of the court postponing the case.

Arraignment.

October 8th, 1888.—The State announces ready, and the defendant, refusing to announce, is put on trial and, being arraigned, answers and pleads not guilty.

Order of Change of Venue.

October 9th, 1888.—After an unsuccessful effort in this case to obtain a jury the State attorney makes the affidavit under art. 579, Code Crim. Proc. It is therefore ordered the venire of this case be, and the same is hereby, changed to the county of Harris, and the State and the defendant both agree thereto. It is therefore ordered that the sheriff of this county do at once deliver the defendant into the custody of the sheriff of Harris county, and the clerks of this court will immediately make out and forward to the clerks of the criminal district court of Harris county a certified transcript of all the orders in this case, together with the papers thereof, in order that this case may be taken jurisdiction of by the criminal district court of Harris county, Texas.

THE STATE OF TEXAS,
County of Fort Bend. }

I, W. H. Gayle, Jr., clerk of the district court of Fort Bend county, Texas, do hereby certify that the foregoing is a true and correct copy

of the original orders in the case, The State of Texas *vs.* Wm.
3 Caldwell, No. 3054, of record in one district court minute book of this date on pages 350 and 352.

Given under my hand and the seal of said court, at office, in Richmond, this the 10th day of October, A. D. 1888.

[SEAL.] W. H. GAYLE, JR., *Clerk.*

Filed Oct. 27th, 1888.

H. BRASHEAR, *Clerk.*

Indictment.

THE STATE OF TEXAS,
County of Fort Bend.

In the District Court of said County. September Term, A. D. 1888.

In the name and by the authority of the State of Texas.

The grand jurors, good and lawful men of the State of Texas, county of Fort Bend, duly tried on oath by the judge of the district court of said county touching their legal qualifications as grand jurors, elected, empannelled, sworn, and charged to inquire into and true presentments make of all offences against the penal laws of said State committed within the body of the county aforesaid, upon their oaths present in the district court of said county that William Caldwell, late of the county of Fort Bend, laborer, on or about the first day of August, in the year of our Lord one thousand eight hundred and eighty-eight, with force of arms, in the said county of Fort Bend and State of Texas, did then and there, unlawfully and with express malice aforethought, kill one J. M. Shamblin by shooting him with a gun, contrary to the form of the statutes in such case made and provided and against the peace and dignity of the State.

H. S. MASON,
Foreman of the Grand Jury.

4 Filed 27th day of September, 1888.

W. H. GAYLE, JR.,
C. D. —, F. B. C.

Filed October 27th, 1888.

H. BRASHEAR,
Clerk Crim. D. C., Harris Co.

Order for Special Venire, Minutes, Oct. 16th, 1889.

THE STATE OF TEXAS
vs.
WM. CALDWELL. } Indictment for Murder.

On motion of the district attorney it is ordered that a special venire issue, directed to the sheriff of Harris county, returnable on the 19th inst., commanding him to summon sixty persons, to be selected, as required by law, from the jurors selected by the jury commissioners

to serve at this term of the court, to be and personally appear before this court on October 21st, 1889, at 10 o'clock a. m., then and there to serve as jurors in this cause.

Verdict of the Jury, Oct. 23rd, 1889.

THE STATE OF TEXAS
vs.
WILLIAM CALDWELL. } No. 6001. Indictment *of* Murder.

On this 23rd day of October, 1889, this cause was called for trial, and the State appeared by the district attorney, and the defendant appeared in person in open court, his counsel being also present, and, the defendant having been duly and legally arraigned; and having pleaded not guilty to the indictment herein, both parties announced ready for trial; and the State, by the district attorney, having heretofore demanded the issuance of a special venire, thereupon a jury of good and lawful men, to wit, J. W. Bell and eleven others, was selected, empanelled, and sworn according to law, and having heard the indictment read and the defendant's plea of not guilty thereto, and having been duly charged by the court, retired in charge of the sheriff to consider of their verdict and, after due determination thereon, were brought into open court by the sheriff, the defendant and his counsel being present, and in due form of law returned into open court the following verdict, which was received by the court and is here now entered upon the minutes of the court, to wit:

THE STATE OF TEXAS
vs.
WM. CALDWELL. } No. 6001.

"We, the jury, find the defendant guilty of murder of the first degree and assess his punishment at death.

J. W. BELL, *Foreman.*"

It is therefore considered and adjudged by the court that the defendant, William Caldwell, is guilty of murder of the first degree, as found by the jury, and that he be punished as has been determined by the jury—that is, with death—and that he be remanded to jail to await the further order of the court herein.

Final Judgment.

THE STATE OF TEXAS
vs.
WILLIAM CALDWELL. } No. 6001. Indictment for Murder.

On this the 30th day of October, 1889, this cause being again called, thereupon came on to be heard the defendant's motion filed herein for a new trial, which motion, after argument of counsel and consideration by the court, is overruled; to which ruling the de-

fendant in open court excepted and gave notice of appeal to the court of appeals.

6 And said defendant having taken an appeal from the judgment herein rendered on a former day of this term to the court of appeals the sentence of the law is not here pronounced against him, but said sentence is suspended until the decision of said court of appeals herein has been received by this court, and the said defendant is remanded to jail to await the further order of this court.

Ten days are allowed the State and the defendant in which to prepare and file a statement of facts herein.

Transcript filed in court of appeals, at Galveston, Texas, Jan'y 28th, 1890.

H. A. MORSE, *Clerk.*

Febr'y 9th, 1890.—Cause submitted on briefs for both parties.

Judgment of Court of Appeals, March 8th, 1890.

WILLIAM CALDWELL, Appellant,
vs.
THE STATE OF TEXAS, Appellee. } No. 2849.

Opinion of the court delivered by Judge WILLSON:

This cause came on to be heard on the transcript of the record of the court below, and, the same being inspected because it is the opinion of the court that there was no error in the judgment, it is ordered, adjudged, and decreed that the judgment of the court below be in all things affirmed and this decision be certified below for observance.

7 *Motion for Rehearing.*

WILLIAM CALDWELL
vs.
THE STATE. } No. 2849.

To the hon. the court of appeals:

The appellant most respectfully petitions the court to grant him a rehearing of his appeal on the ground that the judgment of affirmance is erroneous.

And for ground of such error appellant says the indictment is fatally and fundamentally defective and void under the constitution of the State, and does not, either in form or substance, set out a valid charge of murder or any other offence known to the criminal law of the State, and is not due process of law under the 14th amendment to the Constitution of the United States.

BURNS & BURNS,
Of Counsel for Appellant.

I hereby accept service and agree to the submission of the case.

W. L. DAVIDSON,
Ass't Att'y Gen'l.

Endorsement: No 2849. Wm. Caldwell *vs.* The State of Texas. Motion for rehearing. Filed in the court of appeals of Texas, at Galveston, March 21st, 1890. H. A. Morse, clerk.

Order Transferring Motion.

MARCH 22ND, 1890.

Motion for rehearing submitted and transferred for hearing to Austin.

8 MAY 17TH, 1890.

Motion for rehearing submitted on oral arguments and briefs for both parties.

JUNE 11TH, 1890.

Motion for rehearing overruled; opinion by Hurt, judge.

Opinion of the Court of Appeals on Motion for Rehearing.

WM. CALDWELL *vs.* THE STATE. } No. 2849.

On motion for rehearing.

But one ground is urged for rehearing, viz, the sufficiency of the indictment.

The indictment is in these words and figures:

"In the name and by the authority of the State of Texas.

"The grand jurors, good and lawful men of the State of Texas, county of Fort Bend, duly tried on oath by the judge of the district court of said county touching their legal qualifications, empaneled, sworn and charged to inquire into and true presentment make of all offences against the penal laws of the said State committed within the body of the county aforesaid, upon their oaths present in the district court of said county that William Caldwell, late of the county of Fort Bend, laborer, on or about the first day of August, in the year of our Lord one thousand eight hundred and eighty-eight, with force and arms, in the said county of Fort Bend and State of Texas, did then and there, unlawfully and with express malice aforethought, kill one J. M. Shamblin by shooting him
9 with a gun, contrary to the form of the statutes in such case made and provided and against the peace and dignity of the State."

The first objection to the indictment by counsel for the motion is that it fails to charge that the accused murdered the deceased.

Mr. Bishop says: "It is familiar doctrine that, with such exceptions as foreign laws, private statutes, and municipal by-laws, the courts take cognizance of the law they administer, which, therefore, need not be specially brought to their attention and need not be proved. On the other hand, there is no judicial knowledge

of facts, and they must be alleged and established in evidence. Hence it is one of the first principles of pleadings that you have only occasion to state facts, which must be done for the purpose of informing the court, whose duty it is to declare the law arising upon the facts and to *afford* the opposite party of what is meant to be proved in order to give him an opportunity to answer or traverse it.

"The indictment must allege the primary facts. For example: If it charges simply that the defendant committed larceny it discloses only a secondary fact, produced by a combination of primary facts and law; or, in other words, it is a conclusion of the law upon the facts, and this is not a fit statement upon which to put the accused person on his trial.

"The pleader should set out the primary facts, disconnected from the law, and then the court, applying the law to them, will declare the legal result." 1 Bish. Crim. Proc., 329–331.

The rule above stated is unquestionably correct, and is applied at common law to all indictments except for murder and rape.
10 At common law the indictment in murder must allege that the accused did murder the deceased, and in rape that the accused did ravish the prosecutrix.

Murder and rape, as are all other offences in this State, are statutory offences. Being a statutory offence, Mr. Bishop says that "the indictment must, as in other cases, substantially contain the essential terms of the statute." Ravish was indispensable in the common-law indictment for rape, because it is in the statute of Westminster, 2. "If a man from henceforth do ravish a woman." M. [in] Davies *vs.* The State (42 Texas, 226) the Supreme Court held that the indictment was sufficient without the word ravish or rape. This ruling was based upon the ground that rape was a statutory offence, and that the indictment followed the language of the statute. Rape is defined by our code to be the carnal knowledge of a woman without her consent, obtained by force, threats, or fraud."

Any person with a sound memory and discretion who shall unlawfully kill any reasonable creature in being in this State shall be deemed guilty of murder. Hence murder is the unlawful killing of a reasonable creature in being with malice aforethought. We are not treating of the condition of the slayer's mind.

Now, then, if the word rape can be omitted from the indictment in a prosecution for that offence, why cannot the word murder be omitted in the indictment for that offence? How is it that the indictment for robbery, arson, burglary, theft, or larceny at common law are sufficient when those offences are not by name mentioned in the indictment? At common law there was an allegation in perjury that the accused "did in manner and form aforesaid commit wilful and corrupt perjury." But unless the indictment
11 is, as in murder, drawn on a statute the terms of which are not sufficiently covered by the preceding allegations such a closing argument cannot be necessary, for it is a mere conclusion of law. Indictments should set out facts, not law. 2 Bish. Crim. Proc., § 903.

To the writer this proposition is perfectly sound. But let us concede that the terms of the statute are not sufficiently covered by the preceding allegations. How does a conclusion of law aid such an indictment? This by the way.

The rule that is overwhelmingly supported by authority as well as reason is that the facts constituting the offense must be alleged.

The second objection is that the indictment "omits to charge the time and place of the alleged shooting."

The indictment charges that the appellant, in said county of Fort Bend, on the first day of August, A. D. 1888, did then and there kill Shamblin by shooting him with a gun.

Now, the appellant could not kill the deceased by shooting him with a gun on said date and at said place without shooting him at that time and at that place, for if he killed the deceased by shooting him with a gun the shooting must have occurred at that time, and this is alleged.

Third. It omits to charge the infliction of a mortal wound. It charges that the appellant killed him by shooting him. This he could not have done without inflicting upon the deceased a mortal wound.

Fourth. It omits to charge the date of the wounding and that of the death. If appellant killed deceased on a certain day by shooting him he must have wounded him before he died and deceased must have died on that day.

These objections to the indictment present this question:

12 Does this indictment inform the accused in plain language that he, on a day named, in Fort Bend county, with a loaded gun, shot, wounded, and thereby killed the deceased? It evidently does in the most simple and effective method. No man can read this indictment and have any doubt as to the time and place of the shooting, as to the wound or the date of the same, or the time of the death of the deceased. The information relating to these facts given to the accused by this indictment is as full as that contained in a common-law form for this offence. The plain, simple truth is that the common-law forms are calculated in a great many cases to confuse the accused.

It is altogether useless to tell the accused that his gun was loaded with gunpowder and leaden balls; that he presented his gun at, to, or against the deceased; that he discharged said gun, and that the leaden balls struck and wounded the deceased; that the wound was mortal and deceased died from said wounds.

When told that he killed deceased by shooting him with a gun the accused, unless insane, knows that his gun was loaded; that he discharged at deceased; that he struck him with the ball or balls; that the wound inflicted was mortal, and that from it the deceased died. Under such information as is given by this indictment no man of common intelligence would fail to comprehend at these facts.

Fifth. It fails to charge that the shooting was done unlawfully and with malice aforethought.

Another objection is that it is fatally defective for want of certainty. These will be noticed together. Archbald says of this of-

fense: "It is of little matter by what means the death was effected—
whether by poisoning or shooting, stabbing, cutting, or
13 wounding—whether with a deadly weapon or with a stick or
fist, or by drowning, suffocating, or strangling, or the like."
If the killing was unlawful and with malice aforethought, the death being effected by shooting, such a killing could not be unlawful and with malice and the shooting be lawful and without malice. The allegation that the accused did unlawfully and with his malice aforethought kill the deceased by shooting him with a gun necessarily charges that the shooting was unlawful and with malice. It is true that to shoot a man is not unlawful, nor is the killing of the man. These may be correct propositions, but it does not follow that this court is presuming that a shooting with a gun is a killing. We are not left to presumption regarding this matter, because this indictment charges that the appellant did unlawfully and with malice aforethought kill the deceased. How? By shooting him.

Now, it is not alleged that appellant murdered the deceased by shooting him, the killing being one of the necessary primary facts and not a conclusion from any other fact.

But it is objected that the indictment is not certain to this fact—the killing; that there is no direct, positive, and certain averment that the defendant did kill deceased; that this averment is made indirectly by alleging that defendant killed the deceased "by shooting him with a gun," and that this method of charging a fact is not good pleading. We are referred for authority in support of this proposition to Bush *vs.* The State, 1 Texas, 455, and The State *vs.* Higgins, 53 Vt., 191.

In the Bush case the statute provided that any person who
14 shall keep a tavern, ordinary tippling-house, or other description of establishment for entertainment or for the sale of spirituous liquors by retail and shall sell or otherwise dispose of wine, rum, brandy, whiskey, cordials, or any other description of spirituous liquors in smaller quantities than one quart without license, &c.

The indictment alleged that on a day named the defendant kept a tippling-house by retailing spirituous liquors in quantities less than one quart without first having obtained a license therefor. Now, by reference to the opinion of Justice Wheeler it will be seen that the indictment failed to charge, directly or indirectly, the elements of the offense. This is evident from a comparison of the statute and indictment, and hence the Busch case is not in point. In the Higgins case we have the correct rule. In the opinion it is said: "The charge in substance is that the respondent aided, etc., by doing certain things. As the aiding another to sell liquor is not necessarily unlawful the pleader recognized the necessity of stating the manner of aiding. The averment was material. It must, therefore, be stated positively and directly and in a way that can be traversed. An averment that a person did one thing by doing another thing is not a direct and positive averment that he did the latter thing. The conclusion that he did it is reached only by inference and argument, which is not sufficient in a criminal complaint. The use of the participial form of averment is sometimes sufficient."

Bishop, in his work on Criminal Procedure, vol. 1, p. 556, says:

"Where the direct averment is required, as in laying a main
15 charge, it is usually made with the verb, but any other part of speech which reasonably conveys the idea is adequate, as a participle or even an adverb." Approved precedents are numerous where this form is adopted, mainly in indictments for assault, breach of the peace, resisting an officer, disturbing religious meetings, and adultery. But in each instance it will be noticed that the charge is direct: First, that the accused commit ed that which was an offense in itself without aid or further averments as to the manner of doing it, not that which only becomes an offence by reason of the circumstances under which it was done. Williams, Ch. J., in State *vs.* Dav, 3 Vt., 142, says: "Every indictment must state all the facts and circumstances as constitute the offense, and when the act complained of becomes a crime only from its peculiar relation or circumstances and without them would not be unlawful, then these circumstances or relations should be set forth in the indictment." There are numerous authorities to the effect that if the averment is descriptive of a person, as being of a certain age or as holding a certain office, or relation, as being a sheriff, husband or wife, or is descriptive of intent, or is a statement of knowledge, and this can be expressed so as reasonably to convey the idea, in a qualifying clause, in a sentence containing the main charge, it may be done by use of the participle.

Where lies the distinction? Evidently here: "If the acts which constitute the offense are charged directly the manner of doing it or the means used to accomplish it may be alleged in the participial form." 1 Bish. Crim. Proc., 556, 557, 558.

What, therefore, are the acts which make up the offense
16 of murder? Omitting the capacity of the accused, murder is the unlawful killing of a person with malice aforethought. This indictment alleges that the appellant did unlawfully and with express malice aforethought kill J. M. Shamblin. If this be true appellant is guilty of murder, for it is in law impossible for one person to unlawfully and with malice aforethought kill another person and not be guilty of murder.

This indictment charges positively the commission of that which is in itself a crime. It charges all of the acts entering into the make up of murder—not by alleging the doing of something else, but directly and positively.

If all of the elements of murder were not directly alleged we would hold that no fact necessary to constitute the offense could be indirectly charged so as to cure the defect in the direct allegations. We call special attention to the Higgins case. It will be found an admirable exposition of these rules.

We have answered all the objections urged to the sufficiency of this indictment.

We desire to call attention to the following authorities holding such indictments constitutional:

Newcomb *vs.* State, 37 Miss., 383.
Noles *vs.* State, 24 Ala., 672.
Wolf *vs.* State, 19 Ohio St., 248.
Aiken *vs.* State, 35 Ala., 399.
And specially to Rowan *vs.* State, 30 Wis., 129.

In this case the statute provides that in indictments or informations for murder or manslaughter it shall not be necessary to set forth the manner in which or the means by which the death of deceased was caused, but it shall be sufficient in any indictment
17 for murder to charge that the accused did wilfully, feloniously, and of his malice aforethought kill and murder the deceased. All the constitutional objections made in the case before us were urged in the Rowan case. They were decided against Rowan upon the ground, mainly, that the indictment contained all of the essential elements of the crime. This being the case, it was held that the other matters and things contained in a common-law indictment were formal and hence within the power of the Legislature to change.

Now, we have held that the Legislature of the State has no authority to prescribe a form of indictment and make the same sufficient which fails to contain all of the elements of the crime, but we never held that the Legislature could not prescribe a form of indictment which would not be good if the facts constituting the crime sought to be charged are contained in the form. If the offense is sufficiently particularized as to come within the rule of pleading we would hold that such form would not be obnoxious to constitutional objections, either Federal or State.

The motion for rehearing is overruled.

J. M. HURT, *Judge.*

Endorsements: No. 2849. William Caldwell *vs.* The State of Texas. Opinion on motion for rehearing. Filed in court of appeals, at Austin, June 11th, 1890. P. Walton, clerk. Filed at Galveston, Texas, July 23rd, 1890. H. A. Morse, clerk, at Galveston, Texas.

18 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the court of appeals of the State of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals, before you, between William Caldwell and the State of Texas, said court of appeals being the highest court of law of said State in which a decision could be had in the said suit between William Caldwell and the State of Texas, wherein was drawn in question the validity of a statute of said State on the ground of its being repugnant to the Constitution of the United States — the decision was in favor of such its validity, a manifest error hath happened, to the great damage of

the said William Caldwell, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, the twenty-fifth day of June in the year of our Lord one thousand eight hundred and ninety.

[Seal United States Circuit Court, Eastern District of Texas.]

C. DART,
Clerk of the Circuit Court of the United States for the Eastern District of Texas, at Galveston,
By W. L. HANSCOM, *Deputy.*

Allowed by—
JOHN P. WHITE,
Presiding Judge Court of Appeals of Texas.
Austin, Texas, June 27th, 1890.

[Endorsed:] William Caldwell *vs.* The State of Texas. Original. Writ of error to Supreme Court of the United States. Issued June 25, 1890. Attest: C. Dart, clerk U. S. circuit c't, E. D. T., G., by W. L. Hanscom, deputy. Came to hand and filed in court of appeals, at Galveston, Sept'r 1st, 1890. H. A. Morse, clerk.

19 The United States of America to the State of Texas, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the court of appeals of the State of Texas, wherein William Caldwell is plaintiff in error and The State of Texas is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this twenty-sixth day of June, in the year of our Lord one thousand eight hundred and ninety.

[L. S.] C. DART,
Clerk U. S. Circuit Court, Eastern Dist. of Texas, at Galveston,
By W. L. HANSCOM, *Deputy.*

19½ [Endorsed:] No. 2849. The State of Texas *vs.* William Caldwell. Citation on writ of error. Received & filed Sept'r 1st, 1890. H. A. Morse, clerk court of appeals, at Galveston.

On this twenty-fourth day of July, in the year of our Lord one thousand eight hundred and ninety, personally appeared Thomas E. Sneed before me, the subscriber, A. S. Burleson, a notary public, of Travis county, in the State of Texas, and makes oath that he delivered a true copy of the within citation to L. S. Ross, Governor of the State of Texas, in person, on the 24th day of July, 1890, and also a true copy of the within citation to J. S. Hogg, attorney general of the State of Texas, in person, on the said 24th day of July, A. D. 1890.

THOMAS E. SNEED.

Sworn to and subscribed the 24th day of July, A. D. 1890.

A. S. BURLESON, [L. S.]
Notary Public, of Travis County, Texas.

20 *Order of Court Suspending Mandate.*

JUNE 27TH, 1890.

The mandate in this case is suspended pending the writ of error to the Supreme Court of the United States.

Assignment of Errors. Filed Sept. 7th, 1890.

WILLIAM CALDWELL, Plaintiff in Error,
vs.
THE STATE OF TEXAS, Defendant in Error.

Upon error to the Supreme Court of the United States.

Assignment of Errors.

1. The court of appeals of Texas erred in overruling the motion for rehearing.

2. The court erred in holding the indictment to be "due process of law."

3. The court erred in holding the act of the Legislature of the State of Texas of March 26th, 1881, prescribing the form of indictment for murder employed in this case and declaring the same "sufficient," not violative of the provision of the 14th amendment of the Constitution of the United States, which ordains that "no State shall deprive any person of life, liberty, or property without due process of law."

4th. The effect of the error of said judgment of said court of appeals of Texas, the tribunal of last resort in criminal cases in said State, is to ignominiously deprive plaintiff in error of his life without "due process of law," contrary to the constitutional right of said plaintiff as guaranteed by said 14th amendment of the National Constitution.

II.—*Special Assignment.*

The indictment not "due process of law."

21 1. It does not conform with the customary forms of law

2. It does not embrace, either in substance or form, the requisites of the common law, and therefore is not a constitutional indictment.

3. It does not inform the accused of the "nature and cause of the accusation" against him.

4. It is wanting in certainty in not being direct and positive in its averment of material facts.

5. It fails to state time and place and manner of material and traversable facts, particularly the alleged "shooting."

6. It fails to state that the gun was loaded, and leaves it to be inferred that it was a lethal weapon.

7. It fails to charge the infliction of a mortal wound or the date thereof.

8. It fails to state the date of the death of the deceased, or that he died instantly, but assumes the fact that he did so die.

9. It fails to charge that the alleged "shooting" was an unlawful or criminal act or murderous act done "feloniously and wilfully and with malice aforethought."

10. It fails to charge that the accused murdered the deceased.

11. It fails to charge that the act of homicide was committed feloniously and wilfully or with a sedate, deliberate mind and formed design and with express malice aforethought."

12. It charges no act of criminality for which the accused is punishable, still less by death.

13. It is neither in substance nor form such an indictment as is contemplated by the Constitution, either State or National.

22 III.—*Further Special Assignment.*

1. The opinion of the court in its entirety is an utter misconception of the law of the case and a denial of the constitutional rights of the appellant, non-plaintiff herein, and will result, unless reversed, in the prompt and ignominious deprivation of plaintiff's life, without "due process of law."

BURNS & BURNS,
Of Counsel for William Caldwell, Pl'tff in Error.

Filed Sept. 7th, 1890.

H. A. MORSE,
Clerk Court of Appeals.

I, H. A. Morse, clerk of the court of appeals of Texas, at Galveston, do hereby certify that in the case of Wm. Caldwell, plaintiff in error, *vs.* The State of Texas, defendant in error, the foregoing 22 pages contain a true and correct copy of the caption, order of dist.

court on change of venue, indictment, order for special venire verdict of the jury, and final judgment of the criminal district court' of Harris county, Texas, as same appears in the transcript of the record now on file in this office.

Also a true copy of certain orders made by the court of appeals at this branch, together with the judgment of affirmance, as same appears on the minutes of the court; true copy of the original motion for rehearing, now on file, with a copy of order transferring same to Austin; copy of order submitting motion for rehearing and the overruling thereof as same are certified to this office by the clerk at the Austin branch of this court; a true copy of the opinion of J. M. Hurt, one of the judges of the court of appeals of Texas, overruling said motion for rehearing as the original opinion appears now on file in this office; original writ of error, with allowance
23 by presiding judge, Jno. P. White, of the court of appeals; copy of citation on said writ of error, with return thereon; order of the court of appeals suspending mandate as certified to this office by the clerk at Austin; copy of assignment of errors now on file in this office; said papers, orders, etc., being in the case of Wm. Caldwell *vs.* The State of Texas, appealed from the criminal district court of Harris county, Texas, to this court.

Witness my hand and seal of said court, at Galveston, Texas, this 13th day of September, A. D. 1890.

[Seal Court of Appeals of Texas.]

H. A. MORSE,
Clerk of the Court of Appeals of Texas, at Galveston.

[Endorsed:] William Caldwell, plaintiff in error, *vs.* The State of Texas, defendant in error.

Endorsed on cover: Texas court of appeals. No. 1541. William Caldwell, plaintiff in error, *vs.* The State of Texas. Filed November 3, 1890.

Respectfully
J. Randolph Burns

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890

WILLIAM CALDWELL, Plaintiff in Error,

vs. | *Unconstitutionality of So-called Common Sense Form of Indictment for Murder.*

THE STATE OF TEXAS, Defendant in Error.

Upon Error to the Court of Appeals of Texas.

BRIEF AND ARGUMENT OF J. RANDOLPH BURNS,
FOR PLAINTIFF IN ERROR.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

WILLIAM CALDWELL, Plaintiff in Error,

vs. ~~MURDER~~.

THE STATE OF TEXAS, Defendant in Error.

Unconstitutionality of So-called Common Law Form of Indictment.

Upon Error to the Court of Appeals of Texas.

BRIEF AND ARGUMENT OF J. RANDOLPH BURNS, OF HOUSTON, TEXAS, IN BEHALF OF THE PLAINTIFF IN ERROR.

May it please the court: We have, preliminarily, two favors to ask of the court, one that we be granted such an extension of time beyond that prescribed by the rule, as may be necessary for a discussion of the law of the case, for we have nothing else here to discuss beside the strict law of the case. We respectfully solicit this favor, if indeed that can be rightly considered a favor, which may tend to the court's advantage in the saving of time, if not the labor of re-

search in reaching a full and thorough understanding of the merits of so important a contention as is the present. With the facts of the case we have nothing to do. The questions we propose to discuss are ones purely of law—chiefly constitutional law. We promise not to take advantage of the kindness of the court, if the indulgence be granted, and we will try not to abuse the patience of the court. We pray this indulgence, for the case—in the issues it involves—is not only *res integra*, but is more truly important, perhaps, than any criminal case that has ever engaged the attention of a court of justice in this country.

The other favor—and it will be a favor—is, that we be permitted to have our way in arguing the case without being confined to the order of the assignment of errors. The course of the argument will vary from the order in which the errors are assigned, but will fully comprehend all that is embraced in the assignment.

We will first make a statement of the case, to which will be added some preliminary observations, after which we will state the contention, and then set out, indexically, the points of the argument, and the order in which they will be discussed.

STATEMENT OF THE CASE.

The plaintiff in error, William Caldwell, was on Sept. 27th, 1888, indicted in Fort Bend County, Texas, for the alleged murder of J. M. Shamblin. The venue being changed to Harris County, he was, in the Criminal District Court of said county, to wit, at the City of Houston, in said county, on the 27th

of Dec., 1888, put upon trial, and the jury failing to agree, the result was a mis-trial. On Oct. 23rd, 1889, he was again put upon trial, and was convicted of murder of the first degree, with the death penalty. From the judgment which followed the conviction, he appealed to the Court of Appeals, which court, at its Galveston term, on March 8th, 1890, affirmed the judgment of said Criminal District Court. Up to this time Caldwell had been represented by counsel appointed by the court to defend him—he being too impecunious to employ counsel. Up to the date of the affirmance of the judgment against him, no issue was raised in regard to the indictment in either the trial court or the appellate court, for the reason, we suppose, that the validity of the form of indictment was regarded as no longer an open question—the Court of Appeals having repeatedly held the form of indictment—it being the one prescribed by the Legislature—"sufficient." After the affirmance, we were specially employed for the impeachment of the indictment. Accordingly, within the delay allowable therefor, to-wit: on March 21, 1890, a motion was filed by us for a *rehearing* on the ground following:

No. 2849.

WILLIAM CALDWELL

vs. } *Murder.*

THE STATE.

"To the Honorable, the Court of Appeals: The appellant most respectfully petitions the court to

grant him a rehearing of his appeal, on the ground that the judgment of affirmance is erroneous. And for ground of such error, appellant says the indictment is fatally and fundamentally defective and void under the constitution of the state, and does not, either in form or substance, set out a valid charge of murder, or any other offense known to the criminal law of the state; and is not "*due process of law*" under the 14th amendment of the constitution of the United States.

The court being on the eve of adjournment at Galveston, the motion for rehearing was ordered to be transferred to the Austin branch of the court, where, to-wit: on May 17, 1890, it was heard, upon brief and argument, and taken under advisement; and on June 19, 1890, the court delivered its written opinion, overruling said motion, and holding, in substance, that the indictment was sufficient, and that the act of March 26, 1881, prescribing the form thereof and declaring the same "*sufficient*," was not obnoxious to the constitution, either federal or state. Such being the final judgment of the highest court in the State of Texas to which resort can be had in criminal cases, the appellant, Caldwell, being advised that the judgment of said Court of Appeals was erroneous and reversable, sued out the writ of error upon which the case has been brought before this supreme national tribunal, as being the final arbiter of the constitutional question involved in the contention. There existed an impression on the part of some that the rule *stare decisis* would preclude the Court of Appeals from considering the question of the invalidity of the indict-

ment, the same having been in a number of cases passed upon by the court and adjudged sufficient. It was deemed proper to dispel this impression. Accordingly, it was insisted upon before the Court of Appeals, on the presentation of the motion for rehearing, that the doctrine of *stare decisis* had no application whatever to a question of the character of the present; that that doctrine related to matters of civil controversy, to questions of property and the like—in a word, to the business affairs of life, and not, as before stated, to a question of the character of the present. As said by the late illustrious Chief Justice Moore, in Willis vs. Owen, 43 Tex., 48: "It grows out of the necessity for a uniform and settled rule of property and definite basis for contracts, etc. If a decision is wrong, it is only when it has so long been the rule of action as that time and its continued application as the rule of right between parties demands the sanction of the error. Because when a decision has been recognized as the law of property, and conflicting demands have been adjusted, and contracts have been made with reference to, and on faith of it, greater injustice would be done to individuals, and more injury result to society, by a reversal of such decision, though erroneous, than to follow and observe it. But when a decision is not of this character, upon no sound principle do we feel at liberty to perpetuate an error, into which either our predecessors or ourselves have unadvisedly fallen, merely upon the ground of such erroneous decision having been previously rendered. The questions in these cases have no application whatever to the title or transfer of property or to

matters of contract. They involve the construction and interpretation of the organic law, and present for consideration the structure of the government, the limitation upon legislative and executive power, as safeguards against tyranny and oppression. Certainly it cannot be seriously insisted that questions of this character can be disposed of by the doctrine of *stare decisis.*"

In the case from which the above is taken the question related to the validity of a school tax, and though it had been repeatedly decided the same way, the court over-ruled all its former decisions—some half dozen or more—and held the tax unconstitutional. Additional authority could hardly add any further weight to the foregoing, at least not in Texas.

The following case, however, may serve for illustration: In State vs. Doyle, 11, R. I., 574, the Supreme Court of Rhode Island held: That a complaint before a justice of the peace, for the illegal sale of liquor, must set out the name of the person to whom sold, and that such averment is indispensable. Said the court: "*The contrary practice has prevailed in this state for more than a generation. It is the first time it has been questioned, but we must declare the law.*" So much for the rule *stare decisis.*

As the Court of Appeals had repeatedly adjudged the form of indictment in question sufficient, and as our effort would in effect be to have the court recall its decisions, we deemed it not amiss to address to the court the following invocation in respect of "*pride of opinion.*" We did so because of such pride so often proving a misguiding influence.

"Pride of opinion," said we, "is commonly looked

upon with disfavor, and is often the subject of vehement denunciation. Indiscriminate animadversion, however, is unjust. Pride of opinion is a vice or a virtue—an evil or a good—according to the circumstances that characterise it. When a virtue, it is a great virtue; when a fault, a great fault. As a virtue, it is an eminent one for a judge or a court to possess, for it is then rightly ornamental of the judicial character. In general, he who has no pride of opinion is apt to have no opinion of value; none at least deserving any special consideration. A just pride of opinion is a great judicial virtue, for it enforces the observance of prudence, thought, research and caution in the formation of judgment. Opinions so formed are very apt to be correct. A virtuous and honorable pride of opinion, however, does not always rest satisfied and contented with present conclusions; it is constantly urging on to a more thorough and exhaustive search after truth, and is never so happy as when it finds cause for the correction of what it has discovered to be essentially wrong. No man or set of men, no judge or set of judges, no court or succession of courts, however high or ultimate, can pretend to infallibility. "*To err is human*," and there is among men none perfect—no, not one. It ought to be inscribed on every law book in a judge's library—stamped upon the ermine with which he officially enrobes himself; lettered in capitals upon the bench on which he sits; emblazoned upon the walls of the temple of justice in which he presides, and inscribed in raised letters of gold upon the aiter at which he officiates: "Who changes not his opinions never corrects his errors." It would serve

at least as a sound and wholesome caution.

With pleasure we repeat, and with earnestness commend, the grand utterence of the late illustrious Chief Justice Moore in the case just quoted:

"Upon no sound principle do we feel at liberty to perpetuate an error into which either our predecessors or ourselves have unadvisedly fallen, merely upon the ground of such erroneous decision having been previously rendered."

It was hoped the Court of Appeals would treat the question as *res integra*, and dispose of it as such. We were persuaded so to hope, because the question of the invalidity and unconstitutionality of the form of indictment in question had never been presented to the court, at least not upon any of the grounds assumed by us in this case. The charging part of the indictment is as follows: "That William Caldwell, late of the County of Fort Bend, laborer, on or about the first day of August, in the year of our Lord, one thousand eight hundred and eighty-eight, with force and arms, in the County of Fort Bend, and State of Texas, did then and there, unlawfully and with express malice aforethought, kill one, J. M. Shamblin, by shooting him with a gun, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state." This is a literal copy of Form No. 2, Sec. 11, of the Act of the Legislature of Texas of March 26, 1881, entitled "An act to prescribe the requisites of indictments in certain cases." The section referred to reads thus: "The following forms of indictments in cases to which they are applicable are *sufficient*, and analogous forms may

be used in other cases." Here follows a long string of forms for different offenses, beginning with murder. As we will have occasion to make a general reference to these forms, we will here give some specimens of them.

"Form No. 2, *Murder.* A. B. did with malice aforethought kill C. D. by shooting him with a gun, or by striking him with an iron weight, or by poisoning him, etc."

"Form No. 4, *Aggravated Assault.* A. B. did make an aggravated assault on C. D."

"Form No. 5, *Simple Assault.* A. B. did assault C. D."

"Form No. 8, *Rape.* A. B., an adult male, did rape C. D., a female."

"Form No. 14, *Keeping a Disorderly House.* A. B. did keep a disorderly house."

"Form No. 21, *Theft.* A. B. did steal a horse from C. D., or did steal a watch of the value of fifty dollars from C. D."

As intimately connected with, and having immediate relation to the foregoing forms, Section 12 of the Act contains this very remarkable provision: "Nothing contained in the 11th Section of this Act shall be construed to dispense with the necessity for proof of all the facts constituting the offense charged in an indictment, *as the same is defined by law.*" We will have occasion presently to refer to this 12th Section. The fact cannot be concealed that this attempt to provide a set of forms of criminal procedure, implies a legislative distrust of the ability of the prosecuting officers of the State to properly construct the requisite forms. This distrust is unwarranted. It is not par-

ticipated in by the profession, for the officers referred to have generally proved themselves to be men of capacity, and in not a few instances, persons of genius and learning. It also implies a legislative distrust even of the judiciary itself—a co-ordinate branch of government, the one to which the special prerogative appertains of applying proper correctives to improper pleadings—to pass judgment upon them, and, if necessary, to set them aside. The enactment of any system of pleading—civil or criminal—necessarily involves a thorough knowledge of the entire body of law, and the jurisprudence to which the particular system relates. It may be said, axiomatically, that a knowledge of pleading is the best test of a knowledge of law. To understand pleading in criminal cases, one must be familiar with pleading in civil cases, for the principles of pleading are substantially the same in both. *To be able, then, to correct or reform the system of pleading in either case, criminal or civil, one ought to be—must be—familiar with both.* Now, by the legislation referred to, in which the *sufficiency* of its enactments is roundly asserted, the legislature—inexperienced and unqualified as it is—has undertaken to do something—a vitally important something—a something that concerns the nearest and dearest rights of the citizen—a something that momentously concerns his life and liberty—the correction and reform of a system of criminal pleading, about which the legislature has not, and as a body cannot have, the least possible conception. As well might the legislature have undertaken to calculate an eclipse of the sun, or to predict the return

of a comet. It is as if a parcel of tramps were to venture to man and navigate some magnificent and stately craft, or a gang of jack-tars to architecturally plan and construct a grand and colossal state capitol, or any other huge and splendid edifice. We would reasonably, and without disappointment, expect to hear of a great wreck in the one case, and a chaos of ruins in the other.

The enactment complained of is usurpation. It is an assumption of rights and prerogatives belonging exclusively to a co-ordinate branch of the state government,—the judicial department. It tends to the disorganization of the existing and happily adjusted powers of the state government. A disorganization that, in its last analysis, means anarchy. What right has the legislature to say in advance of judicial investigation and determination, that this, that, or the other form of criminal pleading—designed for the conviction and punishment of accused but presumtively innocent persons,—more especially that originated by itself—*is sufficient.*

Whose business is it, under our American system of government, to pronounce judgment upon the sufficiency or insufficiency of any criminal pleading—the legislature or the judiciary? The question is self-answering. The danger arising from such legislation is not imaginary, but real. As suggested by "*Junius*" what to-day is innovation, to-morrow becomes precedent. There is no knowing to what extent this usurping tendency may be carried, if not speedily arrested. Power, like avarice, is insatiable and ever grasping after more; and from common ex-

perience, legislative power is exactly like all the rest. History is full of the experiences of legislative usurpation —experiences that have taught us that, for the ultimate protection of personal rights, the judiciary, under the constitution, affords the best, and perhaps the only, security. We invoke the judicial branch of the government to rise to the dignity and importance of the occasion, and asserting itself, resist the usurpation, and maintain inviolate the powers confided to its keeping by the people, for the safety of their lives, their liberty and their property—for the protection and security of these sacred and inestimable rights from legislative profanation. But even if the legislature had not been deficient in capacity, there was no occasion for its assumption of the task it undertook. Long prior to the date of the enacment in question, the system of criminal pleading in this state had, as elsewhere, become very much simplified. The common law forms of indictment had been pretty thoroughly eliminated of non-essentials. The field of surplusage had been considerably extended, and been ploughed, harrowed and raked for the eradication and removal of all merely useless, unprofitable and encumbering material; so that at the date of said enactment, the forms of indictment had been perfected, it may be said, by the combined wisdom of the past, and the enlightened experience of the present. So much so was this the case, at the time referred to, that any legislative attempt, or indeed, any other, at further improvement of criminal pleading, was like the smoothing of glass—"a vain and ridiculous excess." But had any attempt at the improvement referred to

been proper or practicable, it was accomplishable, if at all, only through the instrumentality of a commission composed of gentlemen learned in the law—men experienced and practiced in their profession. That of such men, and of such only, could a commission for the purpose indicated be properly composed, is matter that admits of but one opinion. The finding and report of such a commission would have advised the legislature, as to what, if anything, was proper to be done in the premises. But no commission for the purpose was created—nothing of the sort attempted. The legislature itself acted, and as the result we have an almost indescribable folly *Parturiunt montes nascitur ridiculus mus.* This folly is pregnant with other follies. 1.—A disregard of the authority of the Supreme Court of the state in respect of the utter insufficiency of precisely the very forms embraced in the enactment in question. In discussing the certainty requisite in an indictment, the Supreme Court, in Alexander vs. the State, 29 Texas, 496, supposed the existence of these very forms and denounced them as utterly insufficient. 2.—The imbecility of supposing that facts not averred may be proved for the conviction of the accused, as set forth in Sec. 12 of the act above quoted is glaring. It becomes more so, if possible, when it is considered that facts not averred cannot be proved, and facts proved, if not averred, cannot constitute the basis of judgment. This rule obtains universally, in both civil and criminal cases, and in all courts, from the highest to the lowest—even in the Courts of Justices of the Peace.

THE CONTENTION STATED.

Here, now, before this supreme tribunal, as at first before the Court of Appeals of Texas, our contention is: That the form of indictment in this case, as authorized by the Act of the Legislature of Texas of March 26th, 1881, before cited, is not "due process of law" under either the constitution of the state or that of the United States, and that the Act referred to, establishing said form of indictment, is violative of the provision of the 14th amendment of the constitution of the United States, which ordains that, "No state shall deprive any person of life, liberty, or property, without *due process of law*," and, therefore, is null and void. This issue is directly presented in the motion for a *rehearing*, and the contention over it exhaustively presented to the Court of Appeals by both brief and argument. In fact the brief and argument here is but a repetition of the case of the plaintiff in error as presented to the Court of Appeals of Texas. What in addition is here presented, has been elicited by the extraordinary, and, as we contend, erroneous opinion, over-ruling the motion for rehearing, and asserting the validity of the indictment, and the constitutionality of the statute enacting the form of the indictment and declaring it *sufficient*.

We will exhibit our contention under the following headings:

I.

The Contention Stated. (See preceding page)

II.

The Indictment not "Due Process of Law."

And herein of:

1. The Right to "Due Process of Law."
2. Meaning of "Due Process of Law."
3. The Sort of Indictment that is "Due Process of Law."
4. Right of the Accused to be informed of the Nature and Cause of the Accusation Against Him.

And herein of:

a. The Constitution Provision upon the Subject.
b. The Provision Declaratory of the Common Law.
c. Meaning of the Provision.
d. Views of Greenleaf and Bishop upon the Subject.
e. Effect of the Constitutional Provision upon the Power of Legislation.
f. Comparison of the Indictments. The Common Law one—as pruned of its superfluities—and the Statutory or so-called Common Sense One. Result of the comparison—Some extraordinary judicial statements in opposition.

III.

Special Objections to the Indictment.

1. It Omits to Charge the Imposition of a Stroke or Blow.

2. It Omits to Charge the Infliction of a Mortal Wound.

3. It Omits to Charge that the Accused Murdered the Deceased.

4. It Omits to Charge the Time and Place of the Alleged Shooting.

5. It Omits to Charge that the Alleged "Shooting" was Done with "Express Malice Aforethought."

6. It Omits to Charge the Date of Wounding, and that of Death.

7. Further in Relation to the Time of Death.

8. It Omits to Expand the Term "Express Malice Aforethought."

9. It is Fatally Wanting in Certainty.

And herein of:

a. The Rule of Certainty Same in Civil and Criminal Pleading.

b. Some Particular Points of the Indictment to which the Rule Relates.

IV.

Particularity of Averment as Based upon the Connatural Principal of Curiosity.

V.

A Special Fatality of the Indictment.

VI.

Opinion of the Court of Appeals Criticised.

VII.

Conclusion.

II. The Indictment not due process

1. *The Right to Due Process of Law.* The constitution of Texas, Bill of Rights, Section 19, is as follows: "No citizen of this state shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." That of the 5th amendment of the constitution of the United States is, that "No person shall be deprived of life, liberty or property without due process of law." That of the 14th amendment of the constitution of the United States is: "*No state shall deprive any person of life, liberty or property without due process of law.*" This provision of the 14th amendment makes the guaranty doubly imperative upon the states severally, and operates to give the Supreme Court of the United States jurisdiction of, among others, the question whether one condemned capitally in a state court, has, under the law upon which prosecuted, been tried and convicted by "*due process of law.*" The duty of this supreme tribunal, now to review such a question, is as imperative as any other duty it is required to discharge by virtue of any provision of the national constitution. To this point Cooley has the following: "As a principle of state constitutional law has been made a part of the Constitution of the United States, the effect will be to make the Supreme Court of the United States the final arbiter of cases in which a violation of this principle by state laws is complained of, inasmuch as the decisions of the state courts upon laws which are supposed to violate it will be subject to review in that court." (Con. Lim, 359.) Such, then, is the right of the citizen to the security of being criminally proceeded against in a state court only by "due process of law." Of all the provisions of the

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national constitution, there is, perhaps, none more vitally important than the one in the 14th amendment above quoted. It should, in raised letters of burnished gold, be emblazoned upon the dome of every state capitol throughout the length and breadth of the land. The superlative excellency of the provision is above and beyond any and all calculation. Its meaning is that the life, and liberty, and property of the people, *individually*, are, in a national point of view, under the ultimate and paramount supervision and protection, as of right they ought to be, of the government to which the primary and paramount allegiance is due—the national government. It is a provision in substance that no power—not that even of a state—though aided by the combined force of its legislative and judicial authorities—shall deprive any person, however humble and obscure, of either his life, his liberty, or his property, without *due process of law*."

2. *Meaning of Due Process of Law.* It may, perhaps, be of advantage to refer to the definition of the term "due process of law." It is thus tersely stated by the learned Cooley: "*Due process of law in each particular case means such an execution of the powers of government as the settled maxims of the law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.* (Con. Lim. 356.) The following, by Mr. Bishop, expresses a generally excellent idea of the meaning of "due process of law" as relative to an indictment, and therefore is applicable to any mode of prosecution. "The indictment," says he, "must contain an allegation of every criminal fact which constitutes any part of the foundation on which the punishment is based; that, moreover, *it must always, in*

addition to this, conform to those established rules which have been found essential to the protection of the rights of the defendant; that, also, it must come within all constitutional guarantees; and, finally, that it must be so drawn as to render practically available to the prisoner every constitutional right. *These are fundamental requisites, which can never, under any circumstantes, be dispensed with.*" (1 Bish. Cr. Pro. § 505.) Further upon this point will incidentally appear hereafter. Nothing more, however, is deemed really essential, as a careful perusal of the foregoing paragraph from the distinguished authors quoted will sufficiently ascertain and settle the meaning of the term.

3 *The Sort of Indictment that is Due Process of Law.* The Constitution of the United States, 5th amendment, ordains that, "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger." That of **Texas** —Bill of Rights, Sec. 10: "No person shall be held to answer for a criminal offence unless on indictment of a grand jury, except in cases in which the punishment is fine or imprisonment otherwise than in the penitentiary, in cases of impeachment, and cases arising in the army or navy, or in the militia, when in actual service in time of war or public danger." Both constitutions use the same term: "indictment of a grand jury," and it is evident that the provision in the constitution of Texas is taken from the like provision in that of the United States. Indeed, it is *verbatim* the same, even to the extent of the exception about the army and navy, of which the state has and can have neither. The term "indictment of a grand

jury," as used in the two constitutions has, then, precisely the same meaning, whatever that may be. That brings us to the question "what is meant by the term as employed in the constitution?"

We respectfully insist that the indictment mentioned in the American constitutions, has reference to, and means, the common law indictment. The *lex scripta* is to be construed, in one respect, by the meaning of the language employed at the time of the enactment, and the best way to expound it is to consider what answer the law givers would probably have given to the question made if propounded to them. (6 Jacob's Law Dict. 122). It can mean no other, for the framers of the American constitutions had no knowledge whatever of any other indictment. Indeed, there was no other sort of indictment known, and it was known only to common law states and communities. The term "indictment," is a technical one at common law. As such, it was introduced into the early American constitutions, and as such has been continued in them all. "Indictment" is a term, well known and fully understood. But were it otherwise, we should be compelled to resort to the common law for its meaning. Mr. Wharton but states the general rule of interpretation when he says: "Where the legislature makes use of a technical law term, its meaning must be ascertained by the common law." (2 Whar. C. L. § 930) The same rule, of course, applies to constitutions. Therefore, we assert that for the meaning and requisites of the term "indictmant" in the constitution, refrence must be had to the common law, for there is no other law to go to. In Hewitt vs. the State, 25 Tex., 725, after quoting the provision of the constitution as to the prosecution by "indictment of a grand jury,"

and giving the definition of "indictment," as laid down in the code of criminal procedure—which by the way, is *verbatim* that of the common law—Chief Justice Roberts observes that, "at the adoption of our constitution, and for a century previously, both in England and America, this is and was understood as constituting an indictment." Further on the distinguished judge cites the section of the Bill of Rights, heretofore quoted—Sec. 19—and proceeds thus: "The spirit of this provision of the Bill of Rights would seem to apply to this case with great force. It is addressed to and controls the judiciary, as well as the legislature.***His conviction can hardly be said to have been by "due course of law," for when an act is made the subject of a criminal charge, the constitutional provision requiring an indictment, or information, is at once brought into active force in favor of those who are accused of and prosecuted for said act; and if an indictment be preferred, it must be such a one as the framers of the constitution contemplated. Such an indictment then becomes one of the steps in the prosecution in the due course of the law of the land."

A further illustration may be derived from Green vs. Briggs, Curtis, C. C., 311, which was a case before the Circuit Court of the United States for the district of Rhode Island, which involved the validity of a criminal complaint, made under a statute of Rhode Island, for "the suppression of drinking houses and tippling shops." The complaint was in the form prescribed by the statute, and the question was, whether the complaint was valid under the constitution of Rhode Island. Mr. Justice Curtis delivering the opinion, held: "That a criminal charge, not only according to the rules of the common law, but from *the nature*

of the thing, should at least contain enough to show that, if true, the appropriate punishment should be inflicted. I am of the opinion," said the learned judge, "that the complaint in this case was so defective as to render all proceedings under it void. The complaint is in the form required by the act. The difficulty is that the act authorizes a criminal prosecution founded on a complaint which is not "due process of law." The act, so far as it authorizes such a prosecution, being in conflict with the constitution, is inoperative; and it seems to be a necessary conclusion, that it confers no jurisdiction to receive and proceed upon such a complaint. This may be illustrated by supposing a law authorizing a criminal prosecution without a complaint. In such a case there could be no doubt that the whole proceeding would be absolutely void. I think it would be difficult to make a sound distinction between no complaint and one which does not satisfy this requisition of the constitution, which, therefore, is no legal complaint, and is not "due process of law," within the definition of the words, "law of the land." Thus have we seen that to constitute "due process of law," the procedure, whatever it may be—whether indictment or complaint—must be such as conforms to the requirements of the constitution. In this connection, in particular, we have seen that the indictment, when that is the mode of procedure, must, under the constitution, be at least substantially a common law indictment in order to constitute "due process of law."

To be valid, an indictment must charge all the facts essential to constitute the offence of which the defendant is accused. This is the requirement of the common law, and, therefore, of the constitution, and the legislature has

not the power to dispense with it. (See Williams *vs.* The State, 12 Ct. App. 395; Huntsman *vs.* The State, Ib. 614.)

An indictment is defined at common law to be a "written accusation of one or more persons, of a crime or misdemeanor, preferred to, and presented upon oath by a grand jury." (4 Black. Com. 302.) This is the definition of the term "indictment" as it appears in all the American constitutions. Can any one be found ignorant enough to imagine for a moment that it means, and is to be taken as comprehending any and all sorts of accusation? Certainly not, for, otherwise, any sort of accusation for any offense whatever might simply charge that the accused has committed or is guilty of such or such a crime, naming it, and he be at once put to his trial—even in a capital case. No, it means something else. Among other things, it means this: that the accusation—whatever crime or offence it be for—shall be "*in the customary form of law.*" (Bishop "Indictment"—3 Green. on Ev. § 10.) Now, what was the "customary form of law" in an indictment for murder at the time of the adoption of the American constitutions, or, more particularly that of the national government, from which all the others have been borrowed? None other than the common law form, for at that time there was, as we have seen, no other.

4. *Right of the Accused to be Informed of the Nature and cause of the Accusation Against Him:*

And Herein of:

a. Constitutional Provision upon the Subject.
b. The Provision declaratory of the Common Law.
c. Meaning of the Provision.
d. Views of Greenleaf and Bishop upon the Subject.
e. Effect of the Provision upon the Power of Legislation.

f. Comparison of the Indictments—The Common Law One, Pruned of Its Superfluities,—and the Statutory One. Result of the Comparison—Some Extraordinary Judicial Statements in Opposition.

a. *Constitutional Provision Upon the Subject.* The right to notice or demand, it is said, lies at the foundation of the administration of all human justice. In all courts—civil or criminal, military or ecclesiastical—the right is an axiom unquestioned and unquestionable, hence the constitutional requirement—derived from the common law—that the accused, in all criminal prosecutions, "shall be informed of the nature and cause of the accusation against him." The constitution of the United States, Amendment VI, ordains that: "In all criminal prosecutions the accused shall enjoy the right to be informed of the nature and cause of the accusation." That of Texas, Bill of Rights, sec. 10: "in all criminal prosecutions the accused shall have the right to demand the nature and cause of the accusation against him, and to have a copy thereof." That of Massachusetts, Declaration of Rights, Sec. 12: "No subject shall be held to answer for any crime or offense unless the same is fully and plainly, substantially and formally described to him" Though more elaborately expressed, the provision of the Massachusetts constitution is of no larger meaning or greater force than that of either of the others. With but little variation of phraseology, the provision is the same in all the American constitutions. It recognizes, rather than confers, not a privilege, but a right—one which the accused may *demand*, not in some, but in all criminal prosecutions against him.

b. *The Provision Declaratory of the Common Law.* The highest authority asserts—indeed, about it there can be

no contention—that the foregoing constitutional provision is introductory of nothing new, but is only declaratory of the common law upon the subject—that and nothing else. Referring to the provision of the constitution of Massachusetts, Chief Justice Shaw, in Com. vs. Davis, 11 Pick., 432, said: "We are of the opinion this provision does in no respect change the rules of the common law, and such has been the construction put upon it from the adoption of the constitution." In Com. vs. Phillips, 16 Pick 213, the same great jurist held, the whole court concurring, that the provision referred to "has recognized and enforced, and extended to every mode in which the citizen can be called to answer to any charge of crime, the rule of the common law, by which no one shall be held to answer unless the crime with which it is intended to charge him is expressed with reasonable precision, distinctness and fullness, that he may be fully prepared to meet, and, if he can, to answer and repel it." In the case of the State vs. Leonard, 47 Me., 426, the Supreme Court of Maine gives utterance to the following emphatic language: "Whilst the legislature has power to modify and simplify the forms of criminal process, it cannot make valid and sufficient a complaint or indictment in which the accusation is not formally, fully and precisely set forth, as required by the constitution, so that the accused may know of what he is alleged to be guilty, and be prepared to meet the exact charge against him. This right has ever been regarded as sacred, and essential to the protection of the individual citizen. In all the changes of forms, and in the principles and practice of the law, this right has remained untouched and unchanged. The people have not been willing to leave it without the express sanction of the constitution. In

the Bill of Rights it is set down as one of the rights of the accused, in all criminal prosecutions, to have a right to demand the nature and cause of the accusation and to have a copy of it." In Huntsman's case, 12 Ct. App., 619, Mr. Justice Hurt, delivering the opinion of the court, held in the following eloquent and impressive language: "That the authorities and sound reasoning fully warrant, among others, the following conclusions: 1. That the constitutional right to demand the nature and cause of the accusation against him, guarrantees to the accused that the indictment and information shall state every fact and circumstance necessary to a certain, specific and complete description of the particular offense, so as to characterize it, and make it judicially appear upon the record of the cause. 2. That a person tried for a crime not so set forth and described in the indictment in the case, no matter how fully it may describe any other, is not held to answer for the particular criminal offense by an indictment of a grand jury as contemplated by the Bill of Rights. 3. That a conviction for a crime not so made to appear upon the record by the indictment, is not by due course of the law of the land." This masterly opinion dispenses with the necessity of any further authorities to show, as we have asserted, that for the purpose of trial and conviction of one accused of crime, the indictment must be such as is contemplated by the constitution; in other words a constitutional indictment. In this connection, the following, by the High Court of Errors and Appeals of Mississippi, in Norris vs. the State, 33 Miss., 376, is deserving of special attention: "The government, in grafting this provision upon its organic law, did not, as is by some erroneously supposed, proceed upon a principle of tenderness for those actually

guilty of crime, but upon a more wise and humane principle, sanctioned by the experience of ages, that an innocent person may not be unjustly accused of crime, and to afford him an ample opportunity when so accused, to vindicate his innocence. If government could be absolutely assured that none but the really guilty would ever be put upon their trial for crime, it would perhaps not trouble itself to prescribe rules for governing such trials; but as this is utterly impossible, it must act upon the principle, as far as possible, of protecting the innocent and punishing the guilty; and almost all the rules which govern courts in the trial of criminal prosecutions have their origin in this principle. *The object is not to screen the guilty, but to protect the innocent;* and by departure from a rule supported by the clearest dictates of reason, while it may be true that the guilty will seldom, if ever, escape punishment, yet it may be equally true that the innocent may, with almost equal facility in many cases, be convicted and unjustly suffer a punishment designed by the law for criminals only."

c. *Meaning of the Provision.* The "right" of the accused, guaranteed by the constitutional provision in question, relates to "the nature and cause of the accusation against him." Of these, whatever they may be in any particular case, he is "to be informed." Now to be "informed," is to have knowledge of, that is, to be advised, to be instructed, made fully acquainted with. The idea discards not only doubt and uncertainty, but even the necessity of interpretation. This seems to be the idea contemplated by the original word "*informo*," "to fashion the mind." In reference to criminal prosecution, Webster thus defines it: "To communicate a knowledge of facts

to, by way of accusation." It does not appear that the information is to be imparted to the accused at the discretion of the prosecuting authority, or that the degree of it is dependent upon that of the offense charged, as whether felony or misdemeanor, though the courts, *in favorem vitae et libertatis*, have assumed to require greater particularity of averment in the former than in the latter class of offenses, more especially in capital felonies. Evidently the information required to be furnished the accused relates to the facts and circumstances of the case, and not to the law of the case. From the foregoing, it is manifest that the phrase, "nature and cause of the accusation," has reference to the facts and circumstances of the case, and to nothing else. Facts and circumstances, in general, but especially in criminal law, are divisible into two classes, material and immaterial. When, therefore, it is said that the phrase, "nature and cause of the accusation" has reference to the facts and circumstances of the case, the material ones are intended. Of these—the material facts and circumstances—the accused is to be informed by appropriate and sufficient averment, for it cannot reasonably be done in any other way.

Says Bishop: The indictment, or the information, or the complaint before the magistrate, as the case may require, must set out not only such facts as constitute a crime, but all which necessarily enters into the particular criminal compound to which the law attaches the particular punishment to be inflicted.—Bishop on Statutory Crimes, Sec. 371.

d. *Views of Greenleaf and Bishop upon the Subject.* Mr. Greenleaf, in view of this constitutional provision, says: "It is a cardinal doctrine of criminal jurisprudence,

declared in the constitution of the United States, that the accused has a right 'to be informed of the nature and cause of the accusation' against him; or as it is expressed in other constitutions, to have the offense 'fully and plainly, substantially and formally described to him.' This," says he, "is the dictate of natural justice, as well as a doctrine of common law. The description, whether in an indictment or other proceeding, ought to contain all that is material to constitute the crime set forth with precision, and *in the customary form of law.*—(3 Greenleaf on Ev., sec. 10). It is hardly necessary to say that by the phrase "customary forms of law," the learned author refers to the common law forms of averment. In aid of this conclusion, if aid be needed, we submit the following from the Supreme Court of Texas, in Blair vs. the State, 32 Texas, 476: Number seven of the attributes of a good indictment, as defined by the Code of Criminal Procedure, reads thus: "The offense must be set forth in plain and intelligent words." It can scarcely be said that this plain and simple rule relaxes what is sometimes called the rigor of the common law; for though the forms were often verbose, diffuse, and prolix, common sense and plain language were, and it is to be hoped always will be, the best guides of the pleader." This, in itself, is a whole commentary upon the subject.

The following by the Supreme Court of Maryland, in Kearney vs. the State, 48 Md. 16, may be said to voice the constitution: "The want of a direct allegation in an indictment of anything material in the description of the *substance, nature* or *manner* of the crime, cannot be supplied by *intendment*. It is an essential requisite in every indictment that it should allege all matters material

to constitute the particular crime charged, with such positiveness and distinctness as not to need the aid of intendment or implication.' This may be taken as emphasising what we said in the preceding paragraph, in respect of informing the accused of the nature and cause of the accusation against him, to the effect that: "*The idea of so informing him discards not only doubt and uncertainty, but even the necessity of interpretation.*"

Concerning the provision that the accused shall have the right to be informed of the nature and cause of the accusation against him, Mr. Bishop says: "The doctrine seems to be, that this provision of the constitution has the effect to place beyond legislative abolition, one of the principal common law rules respecting the frame of the indictment, as regards matter of *substance*, though not as regards matter of *form*." (1 Bish. Crim. Pro. 101.) "And no matter," says the same able writer, "that is essential to be set forth to show that an offense has been committed, can be mere matter of form." (Ib. 103.) As connected with the foregoing, we add the following from the same author on the subject of the constitutional right of trial by jury. "The idea of a jury trial, as it has always been known where the common law prevails, includes the *allegation*, as a part of the machinery of the trial, the same as it does the judge. To constitute a jury trial, there must be at least these three things: a judge, twelve other men, and an accusation. And an accusation which lacks any particular fact which the law makes essential to the punishment, is, as we have seen, no accusation within the requirements of the common law, and is no accusation in reason." (Ib § 87.)

e. *The effect of the Constitutional Provision Upon the Power*

of Legislation.—Chief Justice Roberts in Hewitt vs. The State, 25 Tex., Sup., 275, speaking of the provision in regard to "due process of law," says: "It is addressed to, and controls, the judiciary as well as the legislature." So of course do the other provisions above referred to—those in respect of "indictment," and "the nature and cause of the accusation," as hereinbefore stated. These provisions are a part of the *suprema lex*, and, as such, are superior to any conflicting or hostile legislation—superior to the enactment we have been discussing. The legislature, no doubt, may authorise the dispensing with matter of surplusage, but it has no power to dispense with any substantial averment deemed material at common law, for the information or conviction of the accused.

We respectfully submit that the legislature has no authority to dispense with any word or phrase that may have been appropriated by the common law as essential to the proper charging of an offense—appropriated by being set out in precedent, or as Greenleaf has it, "in the customary forms of law." It must be remembered that the constitutional provision is designed for the protection of the *innocent*. Well says Chief Justice Gibson, of Pennsylvania, in Hartman vs. Commonwealth, 5 Barr. 66: "Precision in the description of the offense is of vast importance to the innocent; for it is that which marks the the limit of the accusation, and fixes the proof of it." Besides, according to the same great judge, in the same case, "It is never harder to aver the facts than to prove them." In depositing these sacred and inestimable rights within the bulwarks of the constitution, the purpose of those who framed, and of the people who ordained that sacred instrument, was to place them securely beyond the

touch—the profaning touch—of that restless, reckless, ignorant, and fanatical spirit of innovation, that, condemning what it does not understand, is ever ready to pull down and destroy what it knows not how to rebuild. These sacred rights will remain where they were placed by preeminent wisdom and sagacity, for the safety and protection of the citizen in his life and his liberty—to fall, if eventually they must fall, only amid the ruin, wreck and chaos of the American constitutions.

5. *Comparison of the Indictments. The Common Law One—Pruned of its Superfluities—and the Statutory one. Result of the Comparison—Some Extraordinary Judicial Statements in Opposition.*—It is not necessary to here enter upon any discussion of what is a common law indictment. It will be sufficient, perhaps, for the conclusion of this sub-branch of the subject, to simply suggest that, as is evident at a glance, the indictment in this case is in no respect whatever a common law indictment—that it has hardly one element of the latter. This controversy, we should think, could be here ended by a mere comparison of the two indictments. We mean the common law indictment—*as it now stands—pruned of averments merely superfluous and immaterial*—as it has been by, for the most part, judicial sanction—compared with the statutory so-called common sense indictment now in question. *We say common sense* indictment, for *that* is the name by which the Court of Appeals designates it. (12 Ct. of Ap. 175; Ib. 612.) They are as utterly unlike as any two criminal pleadings can possibly be; and if one be right the other is wrong.

For form of the common law indictment for murder, see 4 Black. Com. Appendix, 355; Wharton' Precedents, No. 114; Train & Heard's Precedents, 314; 1 Bish. C. P.

1174. For the form used in the United States Courts, see Wharton's Precedents § 1174, For superfluous and immaterial averments, see the text-writers generally. In opposition to the foregoing, the Court of Appeals of Texas, in its published opinion, gives vent to some very extraordinary utterances. Witness the following: "The information relating to these facts (primary facts) given the accused in this indictment (the one under consideration), is as full as that contained in the common law form for this offense (murder). The plain simple truth is, that the common law form is, in a great many cases, calculated to confuse the accused." After quoting Mr. Bishop to the effect that "the pleader should set out the primary facts disconnected from the law, and then the court applying the law to them will declare the legal result," the Court of appeals proceeds thus: "The rule above stated is unquestionably correct, *and is applied at common law to all indictments except murder, perjury and rape.*" Now, that in the indictment for these—the most enormous of all crimes—murder, perjury and rape—the common law, in its indictments therefor, dispenses with the averment of the "primary facts," and substitutes for them mere conclusions of law, is something never before heard or dreamed of. As eminating from a court of highest penal jurisdiction—the tribunal of last resort in criminal cases in one of the great states of this American Union, such language is extraordinary. It is more—it is startling—astounding—appalling. It is in exact keeping with a recent decision of the same court to the effect that a charge, in an indictment for murder, that [illegible] *murdered* the deceased, is but the charge of [illegible] of law. (Strickland vs. the State,,

touch—the profaning touch—of that restless, reckless, ignorant, and fanatical spirit of innovation, that, condemning what it does not understand, is ever ready to pull down and destroy what it knows not how to rebuild. These sacred rights will remain where they were placed by preeminent wisdom and sagacity, for the safety and protection of the citizen in his life and his liberty—to fall, if eventually they must fall, only amid the ruin, wreck and chaos of the American constitutions.

f. *Comparison of the Indictments. The Common Law One—Pruned of its Superfluities—and the Statutory one. Result of the Comparison—Some Extraordinary Judicial Statements in Opposition.*—It is not necessary to here enter upon any discussion of what is a common law indictment. It will be sufficient, perhaps, for the conclusion of this sub-branch of the subject, to simply suggest that, as is evident at a glance, the indictment in this case is in no respect whatever a common law indictment—that it has hardly one element of the latter. This controversy, we should think, could be here ended by a mere comparison of the two indictments. We mean the common law indictment—*as it now stands—pruned of averments merely superfluous and immaterial*—as it has been by, for the most part, judicial sanction—compared with the statutory so-called common sense indictment now in question. *We say common sense* indictment, for *that* is the name by which the Court of Appeals designates it. (12 Ct. of Ap. 175; Ib. 612.) They are as utterly unlike as any two criminal pleadings can possibly be; and if one be right the other is wrong.

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III.

Special Objections to the Indictment.

1. *It Omits to Charge the Imposition of a Stroke or Blow.* The doctrine is universal, that whenever death is caused by a blow, it is essential that the indictment should allege that the defendant *struck* the deceased. (5 Co. 122*a*; 2 Hale, P. C., 184; 2 Hawk. C. 23, S. 82; Wharton on Hom. § 826, and the text-writers generally.)

2. *It Omits to Charge the Infliction of a Mortal Wound.*—That there is a necessity for such a charge is elementary. It is set forth in all the precedents as indispensable. The length, breadth and depth of the wound may now, upon judicial authority, be disregarded, but not the fact that a "mortal wound" was given. The importance of this will appear if it be remembered that it is the *act* that occasions the death, and not the death, that constitutes the crime. The crime of murder consists in the infliction of *the mortal wound*, coupled with the requisite intent or design, which renders it felonious. The subsequent death of the party is *a result* or sequence rather than a constituent part of the crime. (Green vs. State, Cr. Law. Journ., 267, § 12.) It is an *indispensable* requisite of an indictment for murder by a stroke or blow, that it should allege the infliction of a *mortal wound*, of which the deceased died. (State vs. Morgan, 85 N. C., 581; 2 Whart. Cr. L. § 1069.) "There are," says Wharton, "few deaths from wounds as to which there might not be a reasonable doubt as to whether, if the deceased had been perfectly healthy, or the treatment perfectly skilful, death might not have been averted.***The true *question, then, is—was there a felonious attempt to take life, or inflict bodily harm?* (Cr. L., 941.) This, we submit, is an additional reason, and it is an important one—why the wound—

especially in the absence of a description of it—should be alleged to have been *mortal.* And in respect of the question stated by Mr. Wharton, we respectfully insist: that it can be decided, as an issue, only upon a direct charge that, as applicable to the present case, the shooting was done "*unlawfully and with express malice aforethought.*" But there is no such charge. There was, therefore, no such issue raised by the indictment, and as a consequence, the conviction of the accused was not upon "due process of law," and therefore null and void.

3. *It Omits to Charge that the Accused Murdered the Deceased.*—That the accused *murdered* the deceased is a material averment—none more so in an indictment for murder. It is indispensable to a proper description of the crime of murder, by whatever means the same may have been committed. It is distinctly held by all the authorities—without exception or dissent—that in charging this crime, it is not sufficient to aver that the accused "slew" or "killed" the deceased. (2 Tomlin's Law Dict., 169; 4 Black. Com., 307; 3 Black. Com., 321; 1 Chitty Crim. Law, 243; 2 Hawk. P. C. C. 23, S. 79; 2 Hale, P. C. 187; 1 Rus. on Crimes, 563; Fost. 424; Yelv. 205; 1 Hale, 450, 466; Cro. Jac., 283; Cro. Eliz., 920; Dyer, 69; Kel., 124; 1 Bulst., 144; Bacon's Abr. Indict. G., 1; William's Abr. Indict. IV; 1 East P. C., 345; Burn J. Indict., IX; Com. Dig. Indict., G, 6; Cro. C. C., 37; 1 Bish. Crim. Pro. § 335, Whart. on Hom., § 807; 3 Green. on Ev. § 130.) In the Latin, when that was the language of indictments, *murdravit* was the word used, and without it the indictment, though it contained the words *malitia præcogitata*, was taken to be for manslaughter only. Says Blackstone: "No other word in being, *occidere*, *interficere*, *necare*, or the like,

was sufficient to express the intention of the criminal, or *quo animo* the act was perpetrated, and, therefore, by no means came up to the notion of murder at present entertained by our law." (3 Black. Com. 321.) Says Greenleaf: "In the indictment for this crime (murder) it is alleged that the *prisoner*, describing him, on etc., at etc., of his *malice aforethought*, feloniously *killed and murdered* the deceased, by the means and the manner therein set forth." (3 Green. on Ev. § 130.)

All the precedents of indictment for murder—without exception—charge that the accused did "kill and murder" the deceased. No where do we find—either in the wisdom of the past, or the learning and intelligence of the present, any authority or countenance for the omission of the word *murder* in an indictment for that crime. It was left to the extraordinary sagacity of the Texas legislature of 1881 to discover the propriety of its omission. It may be that the controlling and directing idea of the legislature in regard to the matter was the same startling one afterwards hit upon by the Court of Appeals in casting about for a reason for its support of the prescribed form, to wit: that, in an indictment for murder, a charge that the accused *murdered* the deceased was but the averment of a "*conclusion of law.*" (Strickland vs. The State, 19 Ct. Ap p. 521). But as if this exhibition of judicial inventive genius might become the subject of a demurrer by the profession throughout the state, the Court of Appeals of Texas, in the case now under review here, sought other grounds upon which the omission might be justified. The court discovers an extremely intense anxiety to vindicate and uphold the omission, and in its over-wrought effort in that direction, makes some extraordinary and startling statements. Thus, for in-

stance, say the Court of Appeals—in its opinion to be found in the record: "At common law the indictment for murder must allege that the accused did murder the deceased; and in rape, that the accused did ravish the prosecutrix. Murder and rape, as well as all other offenses, are statutory***In Davis vs. The State, 42 Tex., 226, the Supreme Court held that the indictment for rape was sufficient without the word ravish or rape." "This ruling was, added the court, based upon the ground that *rape* was a statutory offense, and that the indictment followed the the language of the statute." The court then quoted the definition of rape and murder, as set forth in the Criminal Code—which definitions, by-the-by, are *verbatim* those of the common law—and after this, the court in a spirit of triumph, propounds this, designed to be logical and unanswerable, question: "*Now, then, if the word rape* can be omitted from the indictment in a prosecution for that offense, why cannot the word *murder* be omitted in an indictment for that offense?" Were the Court of Appeals of Texas correct about the dispensability, to coin a word for the occasion, of the term *ravish*, in an indictment for *rape*, its suggestion about the omittability, to coin another word, of the term *murder*, in an indictment for that offense, would, perhaps, be of some force. But, unfortunately for the Court of Appeals, it is not true that, in Texas in an indictment for rape, the word *rape* or *ravish* may be omitted. Davis' Blair's case, 42 Texas, 226, cited in the opinion as authority for the omission, is directly to the contrary. The indictment in that case expressly charged that he, Davis, "did, etc., her, the said Mary Schwab, *rape, penetrate and carnally know*, without her consent." And the Supreme Court of Texas—Chief Justice Moore delivering the opinion

—held that unless the word *rape* should be taken as synonymous, as used, with *ravish*, the indictment would, *unquestionably* be insufficient to sustain a conviction." There is, and can be, no apology for so egregious a misconception of so plain, direct and positive a decision as that of the case referred to. This great misconception of the Davis case is the more remarkable for the reason of that case having been cited and approved by the Court of Appeals itself, in Williams vs. The State, 1 Ct. of Ap. 90, and by other cases since. The mistake is most unfortunate and calamitous, for it has lead the Court of Appeals from false premises into a miserably false conclusion, and, what is worse, upon a point of law involving the life of a fellow creature. Analogy is a ponderous weapon when wielded by a logician, but a very dangerous one in unskilled hands. The logic of the court ought at least to be unobjectionable to itself. Therefore answering question with question, we propound the following: "If it be so, and undoubtedly it is exactly so—that the word *ravish*, in an indictment for *rape* cannot be omitted, why should it not be that in an indictment for murder the word murder likewise cannot be omitted?

The Court of Appeals—following the line of thought and effort before indicated, by way of further reason why the word murder should be omitted from an indictment for that offense, with evident sincerity, ask the question: "How is it that indictments for robbery, arson, burglary and theft, are sufficient when those offenses are not, by *name*, mentioned in the indictment?" The question is a singular one, and shows that while judges may be good lawyers, they may be very indifferent philologists. A reply, as general as the question itself, may readily be made.

It is this: that as nouns, the several words standing for the crimes mentioned, have no verbs of corresponding names. For instance, in an indictment it could not be charged that the accused did "*robbery*" the prosecutor, or did "*burglary*" his premises, or did "*arson*" his house, or did "*theft*" his property. There are no such verbs in the language, and the employment of them in an indictment or criminal pleading would be but the production of so much jargon. We might guess, perhaps, at what was meant, without doing any harder guessing than that utilized by the Court of Appeals in *deciphering* the meaning of the terms of the indictment in question. It may further aid the general answer to observe that, one reason why the word murder is employed in an indictment for the crime of that name is, that the *noun* murder has a *verb* of the same name, and, what is special to the case is, that no other word in the whole range of the language is so exactly qualified to express the precise criminality of the offense. We are not sure but that the non-classical and uncouth verb *murdravit* was coined for the purpose of exactly indicating the legal idea of the great crime of murder. Says Blackstone: "No other word in being—*occidere*, *intificere*, *necare*, or the like, was sufficient to express the intention of the criminal, or *quo animo* the act was perpetrated, and, therefore, by no means came up to the notion of murder at present entertained by our law." (3 Black. Com., 321.) Upon this point Bishop has the following: "There are commonly employed in setting out some crimes certain technical words, for which, it is believed, there are *no substitutes*. The following are specimens: 'malice aforethought' and 'murder,' in the indictment for murder, *ravish*, in the indictment for rape. (1 Crim. Pro. 335.) To

all of which this may be added: The averment of 'murder' was an essential and indispensable element in the indictment therefor, at the adoption of the common law indictment for that crime into the constitution, and as long as that form and style of indictment remains in the constitution, as *the one* contemplated by it, an indictment for murder must distinctly charge that the accused *murdered* the deceased." The "customary form of law," referred to by Greenleaf, universally charges the fact to be that the accused did "kill and murder" the deceased. And this "customary form of law," is the one universally used in the courts of the United States. (Wharton's Precedents, No. 114.)

4. *It Omits to Charge the Time and Place of the Alleged Shooting.*—It is an elementary principle that no indictment whatever can be good without precisely showing a certain year and day *of all the material facts alleged in it.*

English Authorities.—5 Bacon's Abridg. 79; 2 Hawkins, P. C. 324, S. 77, and authorities; 2 Hale's, P. C. (Stokes and Ingersoll's ed. 179 and note 2, with authorities); 1 Chitty's Crim. Law, 219-220; 1 Rus. on Crimes, 563; 2 Inst. 318; 1 Arch. Cr. Pl. and Pr. (Warterman's notes) 275.

American Authorities.—1 Bish. Cr. Pro. § 407; 1 Whart. Cr. L. § 261. All the authorities—English and American—ancient and modern—are a unit upon this question. Further, they all agree that when a repetition of time and place is necessary it may be done by the words "then and there." 1 Bish. Cr. Pro. § 407-408; 1 Whart. Cr. L. § 261.

Say the superior courts of Texas—both supreme and appellate—and, indeed, the authorities are all to the same effect—"No part of an indictment can be more matter of substance, as distinguished from matter of form, than

the part which states the time of the commission of the offense."—Drummond *vs.* State, 4 Ct. Ap. 150; Sharp *vs.* State, 6 Ib. 654. It is likewise elementary that every material issuable fact must be stated with both time and place, but that when time and place have once been properly set fourth they may subsequently be repeated by use of the words "then and there." These are entirely wanting in the indictment. There is, therefore, nothing to show *when* the alleged shooting" occurred, or the place *where* it happened. It is alike elementary that such omission is fatal and cannot be supplied by *intendment*. No omitted word will be so supplied. (State *vs.* Dougherty, 30 Tex. 360.) Now the "shooting" is not only a material fact, but the most material in the indictment. This is evident from the circustance of its being the alleged cause of death. We repeat that the omission is fatal.

5. *It Omits to Charge that the Alleged "Shooting" was Done "Unlawfully and with Malice Aforethought."*—*Shooting* is, *per se*, no offence in law, whether done with a gun, a pistol, or a piece of artillery. Such an act is not always fatal; on the contrary, as shown by common experience, it is but seldom fatal. In a hard fought battle, there are usually many wounded to one killed. But "shooting," or "shooting with a gun," is, in itself, not unlawful. Nor is "killing," *per se*, unlawful. The common experience is, as stated by Mr. Bishop (2 Bish. Crim Pro. 620), that "there occur in the community a hundred innocent killings to a single guilty one." No court can presume—in the absence of averment—that "shooting," or "shooting with a gun," is unlawful; still less, that it was a "killing;" still less, still, that it was done with "malice aforethought; and yet still less, with "express malice aforethought." These

would be presumptions far more eccentric and enormously violent, than any court of administrative justice has ever ventured upon. No such character of presumption is to be met with in all the annals of criminal jurisprudence, and what is more, never will be. The *act* of shooting is the alleged, or attempted to be alleged, cause of death. It, therefore—*i. e.*, the "shooting," is to be taken as the *homicidal act*. Now, we know of no principal more universal in its application to a charge of murder than that the *act*—whatever it may be—that causes or produces death, is above all others, *the* one that must be charged with having been committed with the *animus* necessary to constitute the offense. The homicidal act is properly and necessarily distinguishable from the death—the latter being but the consequence or result of the former. It has been well said that the crime of murder consists in the infliction of the fatal wound, coupled with the requisite intent or design which renders it felonious. The subsequent death of the party is a result or sequence, hence, as it is properly held, the homicide is committed when the fatal blow is given. (Green vs. The State, So. Law Journ., Dec., p. 40.) No homicide can be murder, unless the *act* causing death was committed with malice aforethought—that is, with malice and premeditation. (State vs. Curtis, 70 Mo. 594; State vs. Robinson, 73 Mo. 306; Com vs. Sayers, 12 Phil., Pa., 553.) The high authority of Mr. Bishop is also to the effect that the infliction of the blow constitutes the crime of homicide, and that the death does not enter into the offence. (See Jurisdiction in the Guiteau case, 2 Crim. Law Mag. 806.) The rule is universal that an *act* and an *evil intent* must combine—co-exist—to constitute a crime. (1 Bishop C. L.

Sec. 206, 207, and authorities—English and American.) They all cover the point that "giving of the blow which caused the death constitutes the felony." (Rex vs. Harrison, 5 C. & P. 170.) This conclusion of the law may be said to have its solid foundation at once in common sense and natural justice. In regard to the alleged "shooting," we have this further to specially urge: In the absence of an averment that it was unlawful, it is a presumption—conclusive in the particular case—that it was *lawful*, and in the absence of an averment that it was done with "malice aforethought," it is a presumption—*in favorem vitæ*—it was done accidentally, excusably, or justifiably. Again we invoke the rule that nothing can be taken in aid of an indictment.

6. *It Omits to Charge the Date of Wounding, and that of the Death.*—These averments are pre-eminently essential in order to show affirmatively, upon the face of the indictment, that the deceased died from the effects of the wound, within a year and a day from the date of the wound—the presumption of law being, that unless the deceased died within the time mentioned, he died from some natural or other cause, and not at the hands of the accused; and no court or jury can draw any conclusion to the contrary. (3 Green. on Ev. Sec. 120, 143.) The day, it is said, is added to the year in order to put the completion of a full year beyond all doubt, and because, as Lord Coke has observed, "in case of life the rule of law ought to be certain." *This presumption of law is an element of the law of murder, and exists independently of any definition of the crime.* The statutory definition, however, is identical with that of the common law, from which it was copied. The law is, that the fact to which the presumption refers must be set

forth in the indictment, for, as a material fact, unless it is averred it cannot be proved. Thus, in Edmonson *vs.* the State, 41 Tex., at p. 498, the Supreme Court of Texas say, in respect of this matter: "We think the indictment wholly defective; first, because it does not show when the deceased, Julia Edmondson, died. It is essential that it should appear from the indictment, that death happened within a year and a day after the injuries were inflicted." Says Bishop: "The true view appears to be, that the blow is murder or not, according as it produces death within a year and a day or not." 1 Bish., C. P. 51; See 4 Black. Com., 197; 2 Hale, P. C., 179; 1 Hawkins, P. C., 93; 1 Russ. on Crimes, 504; Whart., C. L., 1073; Com. *vs.* Burke, 14 Gray, 101; 3 Green on Ev., 120, 143.

"It is necessary," says Lord Hale, "to allege, in fact, that the party wounded died of that wound, and, also, the *time* and *place*, as well of the *death* as of the *wound* given, that it may appear that he died *within* the year and day of that wound." (2 Hale P. C. 186, Sec. 7.) Where the death was *immediate* it was thus charged in the Latin: "*De qua quidem plaga idem adtunc et ibidem instanter obiit*," which may be Anglicised thus: "Of which said mortal wound he then and there *instantly* died."

A fatal objection to the form of indictment in the particular case complained of—the non-averment of the time of death—is that it admits of no variation and is made to apply to any and all cases without exception—whether the death be instantaneous, or whether it occur a day, a week, a month, or a year or more after the infliction of the lethal injury—the fact of death being left to depend upon the evidence—whatever that may happen to be. Is it possible that such style of pleading, in regard to so material a mat-

though prescribed by the Legislature

ter, can be deemed sufficient? It is absurd to even only suppose such a thing. Our contention is, that no averment in an indictment for murder is more material than that of the death of the deceased, and properly so, for these two important reasons: 1. That however fatal the *homicidal act*, the crime of murder is not complete, at least, not the subject of prosecution, until the resulting death occur. 2. Unless it affirmatively appear upon the face of the indictment that death occurred within a year and a day from the date of the lethal cause, the offense is in contemplation of law, not murder—the benignity and wisdom of the law referring the death in such case to some other cause. The death of the deceased, then, and the date of its occurrence, must appear in the indictment, in the only manner in which they can properly appear, to-wit, by *direct and positive averment*, and unless it do so appear, the omission can in no wise be supplied by presumption, inference, or argument. Had the expression been, "Did *instantly* kill," it would not, in our judgment, have dispensed with an averment of death. But, for the argument, suppose we are mistaken about this, and that the charge in the suggested form would really justify the construction that the deceased died on the day named, how will this possibly help the matter? Not at all would it help, for the word, *instantly*, is omitted, and the court can not supply it.

Suggested

7. *Further—In Relation to the Time of the Death.*—It has been said that, from the averment that on a day certain, the accused "*killed*" the deceased, it is to be considered that the latter *died* on that day—the day named. Indeed, there is a case to that effect—State vs. Ryan, 13 Minn., 371—the only case to be found outside of Texas. But one case can no more make law than one swallow a summer, or one

drop of rain a shower. Such a presumption, if it be a presumption, is one of fact, and its indulgence by the court is simply unwarrantable. As to presumptions, they are of two sorts—one of law, the other of fact. The first, it is said, derives its force from law; the other from logic. The first applies to a *class*, the other to *individual cases*. There is certainly no presumption of law in the present case—none whatever—for no law can be referred to for its establishment—it being an *individual case*. The presumption, then, if there be one, which we deny, is one of *fact;* and the question arises—can the court entertain or indulge it? We say *no*, and say so for the reason that the criminal law imperiously demands that the incriminatory facts be charged by averment *direct*, positive, and certain, so as to—especially in capital cases—utterly preclude the derivation of one fact—particularly a very material one—from another. Where the death was immediate, the averment was, when Latin was the language of indictments—*de qua quidem plaga idem adtunc et ibidem instanter obiit*. The Court of Appeals has, at times, exhibited an extraordinary reluctance to engage in the deduction of unaverred facts. The following instance—a recent one—occurs to us. In Strickland vs. State, 19 Ct. App., 518, Justice Hurt, delivering the opinion, it was held: That an averment that the accused, on a day mentioned, *murdered* the deceased, was fatally defective for not alleging specifically that the accused *killed* him. Said the court: "This indictment simply alleges that the defendant did *murder* by shooting him with a gun." Is this a direct allegation that he *killed* Forsyth? Of course, it is not possible for a person to murder another without committing homicide. There must, in every case, be a killing in order that there be a murder.

But this is not the question. The question is one of *pleading*. From the averment that the defendant *murdered* the deceased, the court declined to infer that he had *killed* him, and reversing the judgment, dismissed the prosecution. Now, to utilize this logic of the court and apply it to the present case, we respectfully submit: That as there cannot be a *murder* without a *killing*, so there cannot be a *killing* without a *death*; but as a charge of *murder* is, "as a matter of *pleading*," not a direct and sufficient averment of the fact of *killing*, so an allegation of killing is, likewise, "as a matter of *pleading*," not a direct and sufficient averment of the fact of *death*. Such is the logic of the Strickland case. It may be here mentioned that it was in this same Strickland case that the learned Court of Appeals of Texas held the most extraordinary doctrine, that a charge that the defendant *murdered* the deceased, is but the charge of a *conclusion of law*. This certainly is something new under the sun, for such a thing was never before heard of. In the present case, however, the court seems to have gone to the opposite of the Strickland case, and to hold that from the averment that on a day certain the accused *killed* Shamblin, the inference is that he *died on that day*. The point we here make is: whether, "as a question of pleading," the averment that, on a day mentioned, the accused killed Shamblin, is a direct and sufficient allegation that Shamblin *died* on that day? Certainly to this question there can be but one reply, and that in the negative. The answer fully determines the insufficiency of the indictment in the particular under consideration, and at once discovers the fact that, "as a matter of pleading," there is no averment of the death, still less of the time of the death of the deceased. Truly is this "mat-

ter of *pleading* a most important thing.

8. *It Omits to Expand the Term, "Express Malice Aforethought."*—The charge, following *verbatim* the language of the code, is that the act was committed "with express malice aforethought." The averment relates to the particular intent or frame of mind with which the inculpatory act was done. It does not, however, sufficiently inform the accused of the nature or meaning of the particular *animus* with which it is sought to charge him. The term should have been stated thus, or similarly, "With sedate, deliberate mind and formed design and with express malice aforethought." The indictment at common law never employs the word "express" to indicate the particular malice intended, for there is no occasion for it—malice aforethought—*malitia præcogitata*—whether express or implied, being, as said by Blackstone, "the grand criterion" whereby the crime of murder is distinguishable from all other homicide. (4 Black., 198.) The common law, however, does not content itself with charging an act of murder as having been committed simply with malice aforethought. It goes further, and invariably employs an expansion of the term, and, for the information of the accused, charges the offense to have been committed "feloniously, willfully and with malice aforethought." (See common law form of indictment, appendix to 4 Black. Com.; also Wharton's Precedents of Indictments, No. 114; also Train & Heard's Precedents.) By analogy, where from a statutory division of murder into degrees, with an assignment of a different punishment to each, the design is to charge murder of the first degree—that is, murder with express malice aforethought—the indictment must aver—and this is our contention here—that the act was

perpetrated with sedate, deliberate mind and formed design, and with express malice aforethought." But in the present, so-called common sense form of indictment, there is neither averment of the act having been done "with sedate, deliberate mind and formed design," nor even of its having been done feloniously and willfully, in addition to the other. And, so, the term, "with express malice aforethought," remains unexpanded and unexplained, and, so, the indictment is fatally defective. We have this further to say, in conclusion of this point: The jurors who try the case are absolutely ignorant of the meaning of the term, "express malice aforethought," until the same is explained to them by the instruction of the court to them in its charge. The accused is not to be supposed any more intelligent or better informed that the jurors who pass upon his case. Now comes this question that imperiously demends a reply: What knows the accused of the meaning of the term "express malice aforethought"—the thing that of all others in the indictment, most vitally concerns him? At the end of the trial, when the court is charging the jury, the accused may be enabled, along with the jury, to gather an idea of what is meant by the murderous term with which he has been charged, but that is not the mode in which, under the guarantees of the constitution, he is entitled "to be informed of the nature and cause of the accusation against him."

9. *It is Fatally Wanting in Certainty.*

And Herein of:

a. The Rule of Certainty—Same in Civil and Criminal Pleadings.

b. Particular Points of the Indictment to which the Defect Relates.

a. The Rule of Certainty—Same in Civil and Criminal Pleadings.—It is a universal rule that an indictment, in its averments of fact, must be direct, positive and certain. This is the rule in civil as well as criminal pleading. "It is elementary," say the Supreme Court of Texas, in Thompson vs. Munger, 15 Texas, 529, "that the pleader must state the facts of his case by averment direct and positive, and not leave them to be deduced by argument and inference. We desire to be understood as here repeating the above and asserting it as a positive rule in criminal pleading. The Supreme Court of Texas in another case—Malone vs. Craig, 22 Texas, 609—lay it down as a rule of civil pleading that "a petition should state the plaintiff's cause of action by distinct averments, and not leave it to the court to deduce the existence of one fact from the statement of another." In Kingsley vs. Bill, 9 Mass., 198, the Supreme Court of Massachusetts hold: "In declaring either for a right detained, or wrong committed, the plaintiff must state every material fact with certainty and precision." And the same court, in a number of cases, hold it to be "a well settled rule of pleading, that, in declaring upon a cause of action, arising under a statute, the plaintiff must state specifically every fact required by the statute to ground the action." These decisions are in harmony with the general doctrine laid down by Chitty, to the effect that, in stating the cause of action in a civil suit, "all the requirements of certainty and precision must be observed." In Phillio vs. Blythe, 12 Texas, 127, the Supreme Court of Texas make the inquiry: "In what does a cause of action consist?" And, after citing and commenting upon Chitty, the court proceeds thus: "The statute requires a plaintiff, in his petition, to set forth a full and clear statement

of his cause of action. This requisition would not be filled by a bald statement of the terms of the contract, if a contract lay at the foundation of the action. An averment of the performance of the contract by the plaintiff, of its breach by the defendant, and, according to Chitty, of the consequent damages, is equally essential, with a statement of the terms of the contract itself, as, together, they contribute the body, or substance, of the cause of action." The foregoing may derive illustration from the pleading necessary in a suit for divorce in Texas. The statute makes it a ground for divorce where either spouse is guilty of excesses, cruel treatment, or outrages toward the other, if such ill treatment is of a nature to render their living together insupportable." In a suit for divorce, it is not sufficient to make a general averment either of "excesses," "cruel treatment," or "outrages," but the petition must set forth the acts complained of specifically, as to time, place, material circumstances, etc. (3 Texas, 168, 716, 538.) We are persuaded that if the averments of this indictment were employed in a civil suit for damages against Caldwell for the murder of Shamblin, a demurrer would be sustained on the ground of insufficiency of statement of the cause of action. The rule of certainty is thus briefly and happily laid down by the illustrious Chief Justice Shaw: "The rules of law require the grand jury to state their charge with as much certainty as the circumstances of the case will permit;" and, it may be added, the legislature cannot authorize them to do less. We desire to be understood as here repeating the preceding rule and asserting it as a positive one in criminal pleading. There is another rule of criminal pleading—a stern, unbending one that admits of no exception and no

amelioration. It is this: "Nothing will be presumed in aid of an indictment." (Boyles vs. The State, 37 Texas, 359.)

b. Some Particular Points of the Indictment to which the Defect Relates.—The indictment avers that the accused "did kill the deceased by shooting him with a gun." Such manner of averment is inherently, fatally defective. We have several objections to this charge: 1. To the "gun" part of it; 2. To the "shooting" part of it; 3. To the "by," or preposition part of it. Of these, in their order: 1. As to the "*gun*": It is not averred to have been *loaded*, and, in aid of the defect, it cannot be presumed that it was loaded—still less loaded with powder and deadly missiles. There is, besides, no statement as to how the gun was used. This we consider a serious defect. The manner in which a lethal weapon is used is indicative of the *animus* with which it is used. Hence the wisdom of the common law in requiring the manner of its use shall be set forth. It is held that a charge in an indictment that the offense was committed "with a shot-gun" does not set forth the manner and circumstances attending the use of the gun with such *certainty* as would enable a defendant to make a complete defense. (Edwards vs. State, 27 Ark., 473; Wharton on Homicide, § 811.) 2. The "*shooting*": We have already had occasion to state that "shooting" another, whether with "a gun, pistol or piece of artillery," is, *per se*, no offense in law. We have more to say upon this point, but will reserve it for another and more appropriate place. 3. The "*by*," or preposition part of it: The indictment avers that the accused did one thing *by* doing another. We will submit a few authorities upon this point, and afterwards criticise the very remarkable

and erroneous opinion of the Court of Appeals in opposition.

Authorities.—A few will serve our purpose—two of them shall be from Texas. In Bush vs. the Republic of Texas, 1 Tex., 455, the charge was that the accused, on a day specified, "kept a tippling house, *by* retailing spirituous liquors in quantities less than a quart, without having first obtained a license therefor." The verdict and judgment were for a fine of a thousand dollars, with imprisonment for three months. On appeal, the Supreme Court of Texas held: "The charge is that Bush, *by* doing one thing, did in fact another—that is, that he, "*by* retailing spirituous liquors, *kept a tippling house.*" "There is, therefore," said the court, "no averment or statement otherwise than by argument and inference, of either material fact and ingredient of the offense." The court ordered that the motion in arrest of judgment be sustained.

In Stephanes vs. The State, 21 Tex., 210, the averment was that the "defendant kept a disorderly house, *by* allowing and permitting great numbers of drunken negroes to congregate and use indecent language, and entertaining them to the great annoyance of," etc. Said the Supreme Court of Texas: "The fact ought to have been averred, and not left to inference. The indictment is insufficient to sustain a conviction where the punishment is fine and imprisonment." This case was cited and approved by the Court of Appeals in Lacindo vs. The State. (2 Ct. App. 59.) Even in the case of a complaint before a magistrate this rule obtains. Thus in State vs. Higgins, 53 Ver., 191, on appeal, the Supreme Court of Vermont held as follows: "The third count charges that the defendant, at" etc., on a day named, 'did aid, abet and assist certain persons and

firms, not resident or doing business in this state, whose names to the said complainant are unknown, to sell, furnish, and dispose of intoxicating liquors, at, etc., without authority, *by* then and there taking orders from said last named persons, for such liquors, and *by* then and there forwarding such orders to said first named parties and firms, and *by* then delivering such liquors to said last named persons, contrary to the form and effect of the statute in such case made and provided, and against the peace and dignity of the state." "This third count," said the court, "charges directly that the defendant did 'aid, abet, and assist certain persons to sell,' etc This would obviously be insufficient, if this were all. But it is argued, that as this is followed by a statement of the *manner* of aiding, etc., the count is good. The charge in substance is, that the defendant aided, etc., *by* doing certain things. As the aiding another to sell liquors is not necessarily unlawful, the pleader recognized the necessity of stating the *manner* of aiding. The averment was material. It must therefore be stated positively and directly, and in a way that can be traversed. An averment that a person did one thing *by* doing another thing, is not a direct and positive averment that he did the latter thing. The conclusion that he did it is reached only by inference and argument, which is not sufficient in a criminal complaint."

By the analogy of the authorities cited, and the principles upon which they are founded, the charge of "killing" the deceased, "*by* shooting him with a gun," is not an averment, at least, not such as it is required to be—direct, positive, and certain—*of the fact of shooting*. There are other grounds upon which the indictment must be held utterly insufficient—unless, indeed, it be intended to en-

tirely ignore all the old, fundamental, familiar and well established principles of correct and customary criminal pleading, and, in addition, to throw, as it were, the constitutional guarantees overboard—all of them, including that of the "Fourteenth Amendment."

IV.

Particularity of Averment—As Based Upon the Connatural Principle of Curiosity.—It will not be amiss to note that the requirement of particularity in all criminal accusations, has its solid foundation in part in an important principle of mental philosophy—that of a deep seated curiosity, natural to all men. "Curiosity," says Upham, "is a leading propensive principle A person without curiosity would be almost as strange as one without sensation. We see the operation of this principle everywhere. When anything unexpected and strange takes place, the attention of all persons is immediately directed towards it; it is not a matter of indifference, but all are anxious to ascertain the *cause*." (See 2 Upham's Mental Philosophy, §114.) To this it may be added, that if the event or occurrence be of serious import, curiosity is stimulated to learn *all the circumstances*; and if the matter concern ourselves, and more especially if it involve an accusation of crime, curiosity becomes at once quick, and, as it were, imperative, in its demand to be fully informed of the "*nature and cause of the accusation*. Curiosity, in such case, vehemently asserts itself. It will stand up erect in obedience to the divinity that created it, and, unappeased, will not down at the bidding of any power that may attempt to suppress it. Such being the case, the philosophy of the law, as an exemplar of its justice, but exhibits wisdom in

yielding gratification to so vital an attribute of our mental constitution." The following will recall the memorable occasion to which it relates: "And when I would have known *the cause* wherefore they accused him, I brought him forth into their council, whom I perceived to be accused of questions of their law, but to have nothing laid to his charge worthy of death or of bonds."

A Special Fatality of the Indictment.—There are other grounds upon which the indictment must be held to be utterly insufficient. We will here present one eminently calculated to expose the absolute infirmity of the present indictment. It is as follows By transposition of its terms the indictment will stand thus: That William Caldwell, on or about etc., in the county of etc., by shooting him with a gun, killed J M Shamblin, with express malice aforethought." Let us employ here a little analysis: 1. We have the term, "By shooting him with a gun." This, in the form in which expressed, is not a certain, direct and positive averment that the accused *did* shoot, etc. It is, at best, but a matter of *description*. But the main point is that it is non-imputative of crime. The mere *shooting* another with a gun not being, *per se*, an offense in law, as heretofore stated. As a result of the act of *shooting*, it is charged that Caldwell killed the deceased. So far the charge is absolutely inoffensive, for the killing another, by "shooting him with a gun," is, in itself, not criminal. It is not even imputative of crime. So far the charge is plain enough, and, in a criminal point of view, harmless. 3. The charge, however, does not rest here; it goes on and concludes that the hitherto described inoffensive act—a non-criminal homicide—some how, or some how else, without saying or pretending how, hap-

pened with "express malice aforethought." Such is the logic of the boasted so-called common sense form of indictment for murder.

VI

Opinion of the Court of Appeals Criticised.—In regard to the case of Bush—a Texas case—the Court of Appeals say: "The indictment alleged that on a day named, the defendant kept a tippling house, by retailing spirituous liquors in quantities less than one quart, without first having obtained a license therefor." Now, by reference to the opinion of Justice Wheeler, it will be seen that the indictment failed to charge, directly or indirectly, the elements of the offense. This is evident from a comparison of the statute and indictment; and hence the Bush case is not *in point.*" In reply to this, we respectfully insist that we correctly quoted the language of Judge Wheeler, by whom the opinion was delivered, and that the Bush case *is* directly in point. We will give the language of Judge Wheeler fully, just as it appears on pages 460–461 of 1 Vol. of Texas Reports: Said his honor—the whole court concurring—"As to the *manner* of making averments, in all cases, those which are descriptive of crime must be introduced upon the record by *averments* in opposition to *argument* and *inference.*" (Citing Chief Jus. DeGrey, in Rex vs. Horne, 2 Cowp. 682; and Arch. Cr. Pl. 40.) Judge Wheeler then proceeds thus: "There is in the indictment before us, no *unqualified* averments that Bush kept either description of house mentioned in the act, or any establishment whatever, for entertainment, or for the sale of spirituous liquors by retail; and this is *one* of the facts and ingredients constituting the offenses inhibited by the statute; nor is it averred that he sold or delivered to any

one, either description of liquors specified in the act, or any description of spirituous liquors whatever; and this is *another* ingredient and circumstance essential to constitute the crime imputed to him. But the charge is, that Bush *by* doing one thing, did, in fact, another—that is, that he *by* retailing spirituous liquors, kept a tippling house." There is, therefore, no averment or statement, otherwise than by argument and inference, of either material fact and ingredient of the offense." Our object in citing the Bush case was to show that in an indictment the accused cannot properly be charged with the doing of one thing *by* the doing of another, and the case for *that* purpose is directly and positively in point. How it is that the Court of Appeals so badly misconceived so plain, direct and unambiguous a case, has to us the aspect of mystery. Over forty years after the decision in the Bush case, we find it cited—in Moore vs. The State, 7 Ct. Ap., 608—in direct support of the doctrine here contended for by us, to the effect that "the facts constituting the crime must be introduced upon the record by *averments direct, positive and certain, in opposition to argument and inference.*"

The case of Stephanes—another Texas case—appears to have escaped the attention of the Court of Appeals. It is like the Bush case, and, like it, directly to the point for which cited by us. The Higgins case—53 Vermont—cited by us—is, to our utter astonishment, claimed by the Court of Appeals as an authority against us. Say the the court: "We call special attention to the Higgins case." We most respectfully do the same, for if the Higgins case be not an authority—and a strong one—for us, we are simply without authority on our side of the ques-

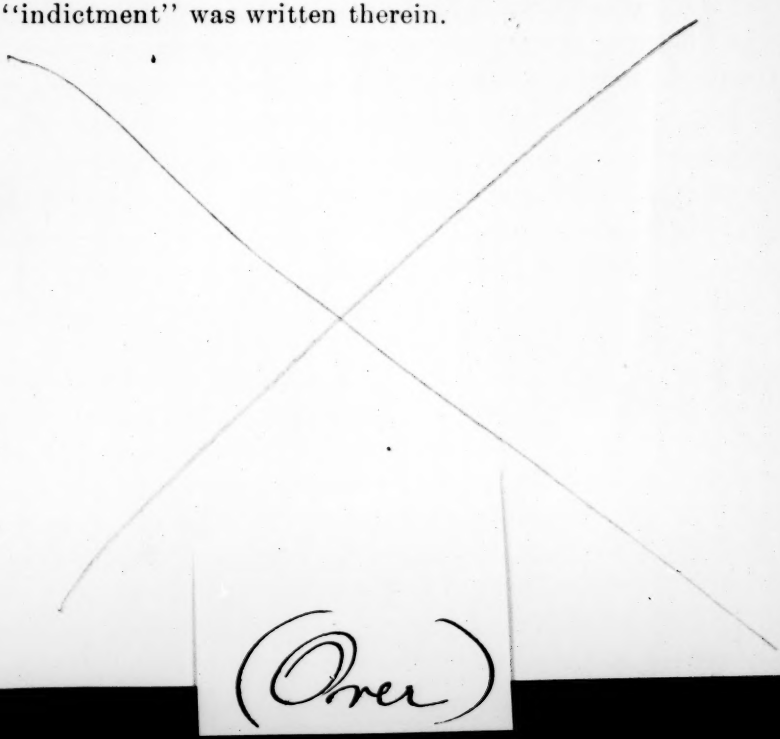
tion. We correctly quoted the *conclusion* of the opinion in that case, and for assurance that we were right, will again repeat the pith of the decision. Speaking to the third count in the indictment, the Supreme Court of Vermont say: "The charge in substance is that the defendant aided, etc., *by* doing certain things. As the aiding another to sell liquors is not necessarily unlawful, the pleader recognized the necessity of stating the *manner* of aiding. The averment was *material*. It must, therefore, be stated positively and directly, and in a way that can be traversed. *An averment that a person did one thing* BY *doing another thing, is not a direct and positive averment that he did the latter thing.*" Whatever else the court may have said—and we are positive it said nothing that militates against our position—the above, in *italics*, is what the court did say, and what is more, it was *the* ground of the court's decision. After this, well may it be asked: to what, in the name of common sense, does the invitation of the court, in the Higgins case, relate?

"Further," say the court, "we desire to call attention to the following authorities holding such indictments as the present constitutional: Noles vs. State, 24 Ala., 672; Aiken vs. State, 35 Ala., 399; Newcombe vs. State, 37 Miss., 383; Wolf vs. State, 19 Ohio, 248; and especially to Rowan's case, 30 Wis., 129." A word or two in reference to these cases: *The Alabama Case.*—Aiken's case, 35 Ala., 399, was summarily disposed of on the authority of Noles' case, 24 Ala., 672. In the latter case there was substantially but one question discussed, namely, the applicability of the 5th Amendment of the Constitution of the United States to the states severally; and the "state-rights" doctrine was held that the amendment was in restraint of the

general government, and had no application as a limitation of the powers of state legislation. That seemed to be the main point in the discussion of the case. *The Mississippi Case.*—In Newcombe's case, the indictment following the statute (Rev. Code, Art 265), charged that the defendant did "feloniously, willfully, and of his malice aforethought, *kill* and *murder*" the deceased. The case, therefore, is not *in point* for the state. *The Ohio Case.*—The strongest point in the case is that it holds the *manner* in which the crime was committed, is "entirely apart from the nature and cause of the accusation." Our reply to this is that the Ohio court is badly mistaken, and we do not believe it would venture a repitition of such an assertion if the opportunity were afforded it. *The Wisconsin Case.*—In reference to the Rowan case, the court say: "All the constitutional objections made in the case before us, were *urged* in the Rowan case." We respectfully reply that this statement is not correct, and we assert, without fear of contradiction, that not one of the objections raised by us in this case, was touched upon or referred to in the Rowan case. We by no means approve the Rowan case, nothwithstanding the indictment therein distinctly charged, in the language of the common law form of indictment, that the defendant "*did willfully, feloniously, and of his malice aforethought, kill and murder*" the deceased. We have objections in the present case that seem not to have been thought of, still less "*urged*," in the Rowan case. We respectfully insist that Rowan's case is clearly hostile to the purpose for which it is referred to by the Court of Appeals. Though not cited by us, it is, in an important particular, strongly in our favor, and we join the Court of Appeals in calling "especial attention to it."

Besides, the charge in the indictment is the same as in the Mississippi Case, and therefore, not an authority for the State.

In this connection, it may here be noticed that a few states have, by legislation, dispensed with the requirement that the *manner* and *means* of a felonious homicide be set out in the indictment for that offense, and Texas has virtually followed the inconsiderate and pernicious example. The reason of the common law, why the manner and the means referred to should be put into an indictment, seems to have been completely lost sight of. The reason of the common law requirement is, that the *manner* and the *means* are to be taken into consideration, in judging of the *intent* of the offender, and the *degree* of his criminality. The reason is an eminently good one, and has its origin as well in the suggestions of natural curiosity, as in the correct and enlightened principles of administrative justice. The common law, in this particular, was merged in the provision of the American constitutions, when the word "indictment" was written therein.



VII.

CONCLUSION.

Just such legislation as we are here complaining of must have been in the contemplation of the learned Mr. Bishop, when, in his work on "Criminal Procedure," discussing the doctrine that "the indictment must allege whatever is, in law, essential to the punishment sought to be inflicted," he penned the following eloquent and impressive language: "This doctrine not only pervades the entire criminal law, it is also, in the absolute sense, fundamental. Springing from natural reason, dwelling in abstract justice, it constitutes a part of our adjudged law, and is likewise confirmed by our written constitutions. Whatever amendments there may be of the laws—whatever sweeping away of forms—whatever overturning, not only of the wrong, but of the right and the just—this doctrine must abide, even in the midst of the wreck of all else pertaining to the law, until, if we could imagine such a thing, law itself is no more." The legislation complained of is evidently designed, not for the information of the accused, but rather as an experiment as to how much of an indictment he can be left to guess at. Such legislation is not criminal, only for the reason that it partakes so much of the insanity of folly.

J. RANDOLPH BURNS,
Counsel for Plaintiff.

Office Supreme Court U. S.
FILED.
MAY 22 1891
JAMES. H. McKENNEY.
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

WILLIAM CALDWELL, PLAINTIFF in error,
vs.
THE STATE OF TEXAS, DEFENDANT in error.
} No. 1541.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF TEXAS.

BRIEF OF A. H. GARLAND FOR THE PLAINTIFF IN ERROR, BY REQUEST, ETC.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

WILLIAM CALDWELL, PLAINTIFF in error,
vs.
THE STATE OF TEXAS.
No. 1541.

MEMORANDUM OF BRIEF ON PETITION FOR A REHEARING.

The question presented on this petition, as to notice to plaiatiff in error of the motion to dismiss, is to be disposed of by the facts of record in the cause, and I take it the court waives that, as it is willing to receive argument as if that motion were now pending, and of which plaintiff in error had due notice.

Then upon the point of the jurisdiction of this court in respect of a Federal question, it is to be said that while *Hurtado's Case* (110 U. S., 516) and others go to the extent that a State may by law provide for punishing persons charged, as Caldwell is here, without indictment, yet if indictment is by the State law the prescribed method, there must be a good indictment, such as is understood by

the common law. Such is unquestionably the doctrine of *Bain ex parte*, 121 U. S., 1 *et seq.* Although Bain's case was in the United States court, yet this court, in passing upon the indictment, held this doctrine substantially as obtaining in the State courts, the United States courts, and the courts of England.

No question is raised here as to the power of the State to dispense with indictment and take some other method in lieu of it, but the question is, can the State, keeping the procedure by indictment in existence, convict upon an indictment fundamentally defective?

That this indictment is essentially defective, Mr. Burns, in his brief, filed November 28, 1890, seems to show, and nothing more need be said on that subject.

It must follow necessarily that, as a fundamental right to Caldwell to have a good indictment, he is protected by the fourteenth amendment as to "due process of law." The authorities abundantly show that whatever process—indictment, information, or what not—brings a man into court for trial, it must be one giving him full notice of all the material facts constituting the offense charged. There can be no "due process of law" without this.

The party "must be notified exactly of the case he is to meet." (*Foster* v. *Kansas*, 112 U. S., 201 *et seq.*; 2 Hare Am. Cons'l L., 845–849, 858–863, 874, 876, and cases cited.)

It is nothing to the purpose to say, in response to this, the State of Texas has ruled this a good indictment and suits her purposes well enough. Some other authority, having an interest in this citizen, and which has the right

to his allegiance, and therefore owing him protection, must also see that it is good and sufficient. The State can not, by direction or indirection, keep this question from this court. It was in part to prevent all this that brought forth the fourteenth amendment. This court, if the fourteenth amendment is not meaningless, must take this question and pass upon it, whether it was raised in the court below or not, as it is a question going to the very bottom of the proceeding, and affects it from the beginning to the end; and this question is waived in no case, and certainly never in one involving life.

In Gelpcke *v.* City, etc., 1 Wall, 175 *et seq.*, it was attempted to beg the question away from the court on just such grounds as are urged here for the dismissal of this case, which were answered in strong and impressive language thus: "We shall never immolate truth, justice, and the law because a State tribunal has erected the altar and decreed the sacrifice" (pp. 206, 207), words quite applicable here and now.

It is submitted, in view of the fact that Caldwell's life is at stake, and in view of the general importance of the question involved, his counsel should be heard upon the merits.

Respectfully,

A. H. GARLAND,
For Plaintiff in Error, by Request, etc.

Office Supreme Court U. S.
FILED.
DEC 13 1890
JAMES. H. McKENNEY.
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 1541.

WILLIAM CALDWELL,

PLAINTIFF IN ERROR,

VS.

THE STATE OF TEXAS,

DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF TEXAS.

MOTION TO ADVANCE.

JAMES S. HOGG,
Attorney General of Texas,
AND
RICHARD H. HARRISON,
Assistant,
For Defendant in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

WILLIAM CALDWELL,
Plaintiff in Error,
vs.
THE STATE OF TEXAS,
Defendant in Error.

No. 1,541.

The State of Texas, defendant in error herein, comes now and, moving this Honorable Court to advance this case, respectfully represents:

I.

STATEMENT OF THE NATURE AND RESULT OF THE CASE.

The only question presented in the record is the sufficiency of the indictment upon which plaintiff in error was tried and convicted in the courts of Texas.

On the 27th of September, 1888, the grand jury of Fort Bend County, Texas, indicted plaintiff in error for the crime of murder committed within the body of said county. (Record, p. 3.)

On October 8, 1888, by agreement between plaintiff and defendant and under order of the District Court of Fort Bend County, the venue was changed to Harris County, Texas. (Record, pp. 1 and 2.)

On the 23d of October, 1889, in the District Court of Harris County, Texas, both parties announced ready for trial, a jury was duly empanelled to try the case, plaintiff in error simply

plead "not guilty," and the case was tried, resulting in a verdict of guilty of murder in the first degree, with the death penalty. The Court entered judgment and sentence accordingly. (Record, p. 4.)

A motion for new trial was made; the grounds therefor do not appear in the record. The Court overruled the motion, plaintiff in error excepted and gave notice of appeal to the Texas Court of Appeals, to which the case was taken. (Record, pp. 4 and 5.) On February 8, 1890, the case was submitted to the Court of Appeals on briefs of both parties, and on March 8, 1890, said Court affirmed the judgment and sentence of the Court below. (Record, p. 5.)

On March 21, 1890, a motion for rehearing was filed. The ground therefor was that the indictment was insufficient under the Texas constitution to charge the offence of murder, by reason of which the trial and conviction had thereupon was not due process of law under the Federal Constitution. (Record, pp. 5 and 6.) On June 11, 1890, the Texas Court of Appeals, in an able and well-considered opinion, held the indictment sufficient under the Texas constitution and laws, and overruled the motion. Whereupon plaintiff in error sued out a writ of error, assigned errors, and brings the case to this Court for revision.

II.

That this being a criminal case is, under the rules of this Honorable Court, entitled to be advanced.

III.

That, by reason of the case being brought to this Court, the judgment and sentence of the State Courts in the premises is suspendent and cannot be carried into execution until the controversy here is disposed of.

IV.

That, on November 3d, 1890, plaintiff in error filed in this

Court his written consent that this cause might be advanced. Wherefore defendant in error prays that the same may be advanced upon the dockets of this Court, and set down for hearing at an early day.

Respectfully submitted,

JAMES S. HOGG,
Att'y Gen'l of Texas,
and
RICHARD H. HARRISON, *Assistant,*
for Defendant in Error.

SUPREME COURT, U.S.
FILED.
DEC 8 1890
JAMES H. McKENNEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 1541.

WILLIAM CALDWELL,

PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS,

DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF TEXAS.

MOTION TO DISMISS.

JAMES S. HOGG,
Attorney General of Texas,
AND
RICHARD H. HARRISON,
Assistant,
For Defendant in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 1,541.

WILLIAM CALDWELL,
Plaintiff in Error,
vs.
THE STATE OF TEXAS,
Defendant in Error.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF TEXAS.

MOTION TO DISMISS.

The State of Texas, defendant in error herein, now comes and says this Court has no jurisdiction of this cause for the reasons:

I.

That the record does not show that before, at or after the trial in the District Court of Texas, any title, right, privilege or immunity under the Federal Constitution or any law or treaty of the United States, was specially set up or claimed by plaintiff in error, or that any such title, right, privileges or immunity was in any way denied him.

II.

That the record does not show that any State law or rule of procedure under or by which plaintiff in error was tried, is repugnant to the Constitution or any law or treaty of the United States.

III.

The record fails to show that the Court of Appeals of the State of Texas passed upon any Federal question in deciding this case, or that said Court denied to plaintiff in error any right, title, privilege or immunity under the Constitution of the United States or any law or treaty thereof.

IV.

That no Federal question has ever been raised in the case; that the matters now complained of and relied on to confer jurisdiction on this Court were presented and urged for the first time on motion for rehearing in the Texas Court of Appeals. Wherefore, defendant in error prays that due notice hereof be given and that the Court dismiss this cause.

JAMES S. HOGG,
Attorney General of Texas,
and
RICHARD H. HARRISON, *Assistant,*
for Defendant in Error.

Statement of the Nature and Result of the Case.

The only question presented in the record is the sufficiency of the indictment upon which plaintiff in error was tried and convicted in the courts of Texas.

On the 27th of September, 1888, the grand jury of Fort Bend County, Texas, indicted plaintiff in error for the crime of murder committed within the body of said county. (Record, p. 3.)

On October 8, 1888, by agreement between plaintiff and defendant and under order of the District Court of Fort Bend County, the venue was changed to Harris County, Texas. (Record, pp. 1 and 2.)

On the 23d of October, 1889, in the District Court of Harris County, Texas, both parties announced ready for trial, a jury was duly empanelled to try the case, plaintiff in error simply plead "not guilty," and the case was tried, resulting in a verdict of guilty of murder in the first degree, with the death penalty. The Court entered judgment and sentence accordingly. (Record, p. 4.)

A motion for new trial was made; the grounds therefor do not appear in the record. The Court overruled the motion, plaintiff in error excepted and gave notice of appeal to the Texas Court of Appeal, to which the case was taken. (Record, pp. 4 and 5.) On February 8, 1890, the case was submitted to the Court of Appeals on briefs of both parties, and on March 8, 1890, said Court affirmed the judgment and sentence of the Court below. (Record, p 5.)

On March 21, 1890, a motion for rehearing was filed. The ground therefor was that the indictment was insufficient under the Texas constitution to charge the offence of murder, by reason of which the trial and conviction had thereupon was not due process of law under the Federal Constitution. (Record, pp. 5 and 6.) On June 11, 1890, the Texas Court of Appeals, in an able and well-considered opinion, held the indictment sufficient under the Texas constitution and laws, and overruled the motion. Whereupon plaintiff in error sued

out a writ of error, assigned errors, and brings the case to this Court for revision. (Record, pp. 6–15.)

I.

Defendant's first proposition under above statement and upon its motion to dismiss.

The right to be prosecuted upon indictment in the State Courts is not a right guaranteed by the Federal Constitution; and the sufficiency of such indictment under the State constitution is a question for the decision of the State courts alone.

Authorities:

Hurtado *vs.* California, 110 U. S., 516;
Spies *vs.* Illinois, 123 U. S., 131;
Brooks *vs.* Missouri, 124 U. S., 394;
Baldwin *vs.* Kansas, 129 U. S., 56;
Walker *vs.* Sauvinett, 92 U. S., 92;
Kennard *vs.* Louisiana, 92 U. S., 480.

II.

Defendant's second proposition under the above statement; and upon its motion to dismiss.

To vest this Court with jurisdiction, by writ of error, to revise the judgment of a State Court of last resort, the record must show that in the trial Court some right, title, privilege or immunity under the Constitution, laws or treaties of the United States, was specially set up or claimed by plaintiff in error, and that it was finally denied him.

Authorities:

Spies *vs.* Illinois, 123 U. S., 131;
Baldwin *vs.* Kansas, 129 U. S., 56, 57.

III.

Defendant's third proposition under the above statement and its motion to dismiss.

To give this Court jurisdiction of this case, it must appear

affirmatively not only that a Federal question was carried before and presented to the Court of Appeals of Texas for decision, but that *its decision* was *necessary* to the *determination* of the cause, and that it was *actually decided*, or that the judgment as rendered could not have been given without deciding it.

Authorities:

De Lassoure *vs.* Gaillard, 127 U. S., 233;
Brown *vs.* Atwell, 92 U. S., 327;
Citizens' Bank *vs.* Board, &c., 98 U. S., 140;
Chauteau *vs.* Gibson, 111 U. S., 200;
Adams Co. *vs.* B. & M. R. R., 112 U. S., 123;
Detroit City R. R. *vs.* Guthord, 114 U. S., 133;
N. O. Water W. Co. *vs.* La. Sugar Co., 125 U. S., 18.

IV.

Defendant's fourth proposition under above statement and upon its motion to dismiss.

A Federal question not presented until after the decision of the State Court of last resort has been rendered, arises too late to give this Court jurisdiction of the case.

Authorities:

Susquehanna Boom Co. *vs.* W. B. B. Boom Co., 110 U. S., 57;
Clark *vs.* Pennsylvania, 128 U. S., 397;
Chappell *vs.* Bradshaw, 128 U. S., 134;
Warfield *vs.* Chaffe, 91 U. S., 690;
Spies *vs.* Illinois, 123 U. S., 131;
Brooks *vs.* Missouri, 124 U. S., 394;
Baldwin *vs.* Kansas, 129 U. S., 56, 57.

Respectfully submitted,

JAMES S. HOGG,
Att'y Gen'l of Texas,
and
RICHARD H. HARRISON, *Assistant,*
for Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1541.

WILLIAM CALDWELL, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS, DEFENDANT IN ERROR.

PETITION FOR REHEARING.

To the honorable the Supreme Court of the United States:

William Caldwell, plaintiff in error in the above entitled and numbered cause, by his counsel of record, respectfully petitions the Court to grant him a *rehearing* of the motion to dismiss the writ of error in said cause on the ground following, to wit: That the procedure by said motion—the filing and submission of the same—was *ex parte* and without notice. For greater particularity petitioner avers that there was no notice whatever given of the filing of said motion, nor of the contents or substance thereof, nor of brief or argument, if any, in support or advocacy thereof, nor of the time proposed or set for the hearing of the same by the Court; that no such notice—nothing of the sort, none at all—was given petitioner or his counsel, either by mail, express, telegraph, or otherwise. Petitioner avers that himself and his counsel have hitherto been and still are wholly unadvised and completely in the dark in respect of the filing of said motion and its pendency before the Court, and likewise of the procedure based upon and connected therewith. Petitioner says he is advised that in respect of the matter of notice in such cases this honorable Court has prescribed the following procedure, known as "Rule No. 6:"

"All motions to dismiss writs of error and appeals, except motions to docket and dismiss under Rule 9, must be submitted in

the first instance on printed briefs or arguments. If the Court desires further argument on that subject, it will be ordered in connection with the hearing on the merits. The party moving to dismiss shall serve notice of the motion, with a copy of his brief or argument, on the counsel for plaintiff in error or appellant of record in this Court, at least three weeks before the time fixed for submitting the motion, in all cases except where the counsel to be notified resides west of the Rocky Mountains, in which case the notice shall be at least thirty days. Affidavits of the deposit in the mail of the notice and brief to the proper address of the counsel to be served, duly post-paid, at such time as to reach him, by due course of mail, the three weeks or thirty days before the time fixed by the notice will be regarded as *prima facie* evidence of service on counsel who reside without the District of Columbia. On proof of such service the motion will be considered, unless for satisfactory reasons further time be given by the Court to either party."

Petitioner avers that the first intimation he had of the existence or pendency of said motion in this Court was on the 14th of the present month, January, 1891, when he was told that it was reported by the Washington correspondent of the *Galveston News*, in the issue of that paper of the 13th inst., that on the day previous, to wit, the 12th inst., this Court had, on motion, dismissed petitioner's writ of error for want of jurisdiction. The surprise of petitioner and his counsel at this news may perhaps be imagined. His counsel immediately wrote to the clerk of the Court for a copy of said motion and of the special reasons given by the Court, if any, for its action thereupon, to which as yet no reply has been received. Petitioner avers that it was not until the 17th inst. that he received official information, if such it may be regarded, as to the filing and the object of the motion in question and of the action of the Court thereupon; that said information was derived from the following letter of the clerk of this Court, and was communicated to petitioner by his counsel, to whom it was addressed:

"WASHINGTON, *January* 12*th*, 1891.

"J. R. Burns, Esqr., Houston, Tex.

"DEAR SIR: Yours of 20th ult. to Mr. Garland was duly received by him and handed to me for answer when the information became available. In case of Caldwell *vs.* The State of Texas, on the 15th ult. the attorney for the State submitted to the Court two motions—one to dismiss for want of jurisdiction and the other to advance the case. This morning the Court entered its order dismissing the writ of error for want of jurisdiction, and consequently there is no necessity of passing on the motion to advance.

"Yours truly, JAMES H. MCKENNEY,
"Per H. C. M."

Thus, it will be seen—and petitioner solemnly avers it to be the fact—that himself and his counsel were neither of them apprised of the filing of said motion until over a month after that event and about five days subsequent to the action of the Court disposing of the same. Petitioner is informed by his counsel, and therefore so believes and avers, that the communication of the 20th ult. to Mr. Garland, now in the hands of the clerk and referred to by that officer, was merely an inquiry as to the status of the petitioner's case and the probable time it would be set for trial by the Court, and petitioner respectfully requests that the clerk be permitted, and, if necessary, directed, to file said letter herewith for the inspection of the Court. Petitioner avers that the response of Mr. Garland was to the effect that the case would be set by the Court for trial some time during January (the present month); for what particular day, however, could not be stated, but that the clerk would telegraph petitioner's counsel in time for him to be present. Petitioner says that exhibition of said response of Mr. Garland will be made at the hearing of this petition.

Petitioner avers that in this whole proceeding he has been dealt with in an *ex parte* manner, and, though doubtless with no wrong intent whatever, yet, as involving his life, with a degree and gravity of error seldom equalled in a court of justice.

Petitioner gives assurance of his belief, and he is so advised, that this great tribunal of last resort has jurisdiction of his case. The language of the learned Cooley upon this point is as follows:

"As a principle of State constitutional law has been made a part of the Constitution of the United States, the effect will be to make the Supreme Court of the United States the final arbiter of cases in which a violation of this principle by State laws is complained of, inasmuch as the decisions of the State courts upon laws which are supposed to violate it will be subject to review in that Court." (Con. Lim., 359.)

Petitioner begs to remind this great and "final arbiter" tribunal that the contention in his case is that the act of March 26th, 1881, of the Legislature of Texas, prescribing the so-called common-sense form of indictment for murder—the form of indictment under which petitioner was arraigned, tried, and convicted—is violative of the fourteenth amendment of the Constitution of the United States by reason of said so-called common-sense form of indictment not being "due process of law" within the contemplation and meaning of said amendment.

Petitioner humbly submits that if the class of cases to which

his belongs be not within the jurisdiction of this honorable Court to hear and determine, then the provision of the fourteenth amendment referred to has ceased to be a part of the National Constitution, or, worse, has come to be so ambiguous or meaningless as not to be susceptible of judicial interpretation. The premises considered, petitioner prays, *first*, that the clerk of the Court be directed to furnish the attorney of record of the State of Texas in this case a copy of this petition, with notice of the time the Court may set for the hearing of the same; *second*, that after due proceedings had, the Court vacate its order dismissing the writ of error; *third*, that, reinstating the motion referred to, the Court direct that due notice thereof be given by the mover of the same, in conformity with the requirements of Rule 6, and that, under the existing circumstances, said attorney be, in addition, required to register said notice in the mail and file of record in this cause a copy of said notice, together with the certificate of its registry, for the inspection of the Court and whomsoever it may concern; *fourth* and finally, that upon the rehearing of said motion to dismiss, the same be overruled and the cause set for trial upon its merits. And, as in duty bound, petitioner will ever pray, &c.

J. RANDOLPH BURNS,
Counsel of Record for Wm. Caldwell,
Plaintiff in Error in the Above Cause.
WILLIAM CALDWELL.

Sworn to and subscribed before me, at Houston, Texas, this 22d day of January, 1891, for which purpose I went to the jail of Harris county.

[SEAL.] WM. R. FAYLE,
Notary Public, Harris County, Texas.

THE STATE OF TEXAS, }
Harris County. }

Before me, the undersigned authority, personally appeared J. Randolph Burns, to me well known, who, being duly sworn, deposes and says that he is a member of the bar of the Supreme Court of the United States and is the counsel of record of William Caldwell, plaintiff in error, in the case of William Caldwell, plaintiff in error, *vs.* The State of Texas, defendant in error, pending in said Supreme Court; that he has never received, by mail or otherwise, any notice whatever of any motion or the filing thereof in said Supreme Court for the dismissal of the writ of error in said above-entitled cause nor of a brief or argument, if any, in advocacy or support of same, nor

of the time when said motion would be submitted to or be heard by the court; that the first and only information he has had upon the subject of said motion, aside from the report in the *Galveston News* of the 13th inst., referred to in the foregoing petition of Caldwell, is that embraced in the letter of the clerk of this Court to affiant, of date January 12, 1891, set forth in said foregoing petition of Caldwell and now hereto attached. Affiant says he has his permanent residence in the city of Houston, Harris county, Texas, and has had it there for over twelve months past; that he regularly receives his daily mail there; that he does not believe any notice concerning said motion was ever mailed to him from Washington, but that if the fact be otherwise said notice has never reached him.

J. RANDOLPH BURNS,
Counsel of Record for William Caldwell.

Sworn to and subscribed before me this 22d day of January, 1891, to certify which I herewith attach my official signature and seal of office, at the city of Houston and State of Texas, the date above written.

[SEAL.]

WM. R. FAYLE,
Notary Public, Harris County, Texas.